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1                   UNITED STATES DISTRICT COURT  
2                   EASTERN DISTRICT OF NEW YORK  
3 ROBERT A. FALISE; LOUIS                 )  
4 KLEIN, JR.; FRANK                         )MACCHIAROIA; and                         )  
5 CHRISTIAN E. MARKEY, JR.,                 )As Trustee,                                 )  
6                         )   )  
7                         )   )  
8                         )Plaintiffs,                                     )  
9 COMPANY; RJ REYNOLDS TOBACCO             )THE AMERICAN TOBACCO                     )  
10 PLC; BROWN & WILLIAMSON                 )COMPANY; B.A.T. INDUSTRIES,                 )  
11 MORRIS INCORPORATED; LIGGETT             )TOBACCO CORPORATION; PHILIP                 )  
12 TOBACCO COMPANY,                         )GROUP, INC.; and LORILLARD                 )  
13                         )  
14                         )----- )  
15                         CONTINUED VIDEOTAPED  
16 DEPOSITION OF PROFESSOR KAREN GROSS  
17                         New York, New York  
18                         Friday, June 9, 2000  
19  
20  
21

22 Reported by:

23 ROBERT X. SHAW, CSRCR NO. 817  
24 JOB NO. 109504

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4                         June 9, 2000  
5                         10:15 a.m.

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7                         Continued Videotaped Deposition of  
8 PROFESSOR KAREN GROSS, held at the offices  
9 of Orrick Herrington Sutcliffe, LLP, 666 Fifth  
10 Avenue, New York, New York, pursuant to  
11 Adjournment, before Robert X. Shaw, CSR, a  
12 Notary Public of the State of New York.

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A P P E A R A N C E S:

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3                         ORRICK HERRINGTON & SUTCLIFFE, LLP  
4                         Attorneys for Plaintiffs  
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7                         BY: STEVEN J. FINK, ESQ.

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14 BY: JAMES C. MUNSON, ESQ.  
15       -and-  
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19 BY: EZRA J. REINSTEIN, ESQ.

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21  
22  
23  
24  
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1 A P P E A R A N C E S (Cont'd)

2

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4 Attorneys for RJ Reynolds Tobacco  
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8 BY: BONNIE KAY DONAHUE, ESQ.

9

10

11 ALSO PRESENT:

12       Silvio Facchin, CLVS  
13       Esquire Video Services

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1       THE VIDEOGRAPHER: I will ask you to stand  
2 by, please.

3       This is the tape labeled number 5 of the  
4 videotaped deposition of Karen Gross. We are now  
5 going on the record, the time is 10:15 a.m.

6 Q. Good morning, Professor Gross.

7 A. Good morning.

8 MR. FINK: I will ask the court reporter to  
9 mark as Exhibit 5 a letter that I received from  
10 counsel.

11       (Gross Exhibit 5, June 8, 2000 letter from  
12 Ezra Reinstein, marked for identification as of  
13 this date.)

14 KAREN GROSS, called as a  
15 witness, having been previously duly sworn by the  
16 Notary Public, was examined and testified as  
17 follows:.

18 CONT'D EXAMINATION

19 BY MR. FINK:

20 Q. Professor Gross, do you have before you what  
21 has been marked as Exhibit 5?

22       A. Yes.  
23       Q. It is a letter from Mr. Reinstein of Kirkland  
24 & Ellis dated June 8th. This letter reflects that

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1       there are three items that you had reviewed and relied  
2       on, but which are not reflected in your list of  
3       reliance materials in this case here.

4           I will ask you to look at the letter and if  
5       you can confirm for me that those are indeed items that  
6       you have reviewed and relied on?

7       A. Sure. Just give me a second to read it.

8       Q. Thank you.

9       A. Yes, I have read it.

10      Q. Are the descriptions, I will ask you this,  
11     are the statements in the letter accurate to the best  
12     of your understanding?

13      A. Yes. Absolutely.

14      Q. Are there any materials other than those  
15     listed in the letter that you have reviewed and relied  
16     on in connection with the preparation of your reports  
17     in this case other than those listed on the reliance  
18     list in your report, your report and supplemental  
19     report?

20      A. Other than what's in this letter and in the  
21     reports, there is nothing else.

22      Q. Thank you. Professor Gross, I will ask you  
23     at this time to turn your attention to what was marked  
24     at the first day of the deposition, which is Exhibit 2,

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1       which is the supplemental report. Specifically,  
2       Professor Gross, if you could focus on what's entitled  
3       as basis two on page 5 of the report.

4           Are you with me there?

5       A. Yes, I am.

6       Q. The first sentence under basis two on page 5  
7       says given the magnitude of the trust's financial  
8       distress, a number of options were available to the  
9       trust for consideration post-consummation.

10      My question to you is -- and then you go on  
11     to talk about these options -- what is the specific  
12     time frame that you were contemplating when you  
13     discussed the options available to the trust?

14      A. If you don't mind --

15      Q. Feel free to review any portion of your  
16     report that will put this in context or otherwise help  
17     you to answer the question.

18      MR. MUNSON: Would you repeat the question,  
19     please. Read it back, please Mr. Reporter.

20           (Record read.)

21      MR. MUNSON: Thank you.

22      A. This sentence is referring to the options  
23     that the trust considered following consummation of the  
24     plan of reorganization, which was in November of 1988.

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1       And it is the options that were considered  
2       available to them for consideration in that period  
3       subsequent to confirmation.

4       Q. All right. And in your report you referred  
5       to these as being considerations post-consummation; is  
6       that right?

7       A. Yes. My first report addresses a combination  
8 of issues and this report principally focuses on the  
9 period from consummation going forward to plan  
10 implementation and then forward after that.

11       Q. When was the consummation date?

12       A. The plan was consummated in November of  
13 1988.

14       Q. So, taking that as a starting point, November  
15 of 1988, was there an ending point to the time during  
16 which these various options were available to the trust  
17 in your view?

18       A. Let me make several observations in regard to  
19 that question. The first is that the consideration of  
20 options post-consummation has to be taken in context  
21 and I want to describe several of those contexts.

22           One was that there was litigation pending and  
23 there were various efforts to deal with the trust  
24 problems that were before a court.

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1           And even after an initial decision  
2 while things were being appealed there was further  
3 opportunity to consider various options in the context  
4 of that litigation.

5           In addition to that, the trust had its own on  
6 going effort to continue to do that which it did and in  
7 the course of that had the opportunity to consider how  
8 to deal with its situation, and third, all of this  
9 occurs in the context of the trust growing out of the  
10 plan and having to make choices and think about choices  
11 in light of the plan, and in light of what the trust  
12 was supposed to do subsequent to consummation.

13       Q. With that background, Professor, my question  
14 to you I think is a more simple one. Given November of  
15 1988 as the beginning point, can you give me an ending  
16 point, book marks if you will, for the time period  
17 during which these considerations that you have  
18 outlined here were relevant?

19       A. Well, I have described to you three contexts  
20 really in which the trust had to think, among others I  
21 am sure.

22           The first as to the litigation. The  
23 litigation ultimately resulted in a TDP, which became  
24 operative. And when that became true the trust then

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1       still had to continue to operate, it is just, and had  
2 to think about what to do and how to proceed, but  
3 certain things had been resolved under that TDP.

4           Second, in terms of just its on going  
5 operations, those are not time limited in the same way;  
6 and third, in terms of its obligations to act in  
7 accordance with how it was constructed and supposed to  
8 operate based on bankruptcy code provisions, remains an  
9 on going obligation.

10           So the time length to consider options  
11 depends on which of those three particular things one  
12 is focusing on.

13       Q. Professor, you go on, do you not, on pages  
14 five and six to enumerate in a number of bullet point  
15 entries various options that you say were available to  
16 the trust post-consummation.

17       A. Yes, I do.

18 Q. And am I understanding your testimony  
19 correctly to be that all those options remain relevant  
20 today?

21 A. If it is acceptable, let me just look through  
22 the list.

23 Q. Please feel free in answering any of my  
24 questions to look at anything that has been put before  
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1 you as necessary to help you answer.

2 A. I would say these options had their primary  
3 focus on resolving the trust's acute financial dilemmas  
4 and its acute structural and operational deficits.

5 There are aspects of these options, however,  
6 which on a go-forward basis may be ones that the trust  
7 would again have to think about, for example, altering  
8 the timing of payments is something that it has had to  
9 consider subsequent to 1995 because it is not clear  
10 that even post TDP it is not clear that the trust will  
11 be able to resolve its fundamental and deep flaws.

12 And in that sense although the TDP  
13 contemplated that claimants would receive 10 percent,  
14 only 10 percent of their claim, it is not clear going  
15 into perpetuity that even that will be able to be  
16 fulfilled.

17 Q. Can I ask you, Professor, what's the basis  
18 for the statement, what's your basis for the statement  
19 that you just made that on a going forward basis the  
20 trust may not be able to meet its 10 percent pay out  
21 obligation?

22 A. Um, in reaching my conclusions and opinions  
23 in this I have relied on a variety of documents from  
24 the trust itself that the trust either had written to  
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1 outsiders or internally, and it is in that context that  
2 I saw references to concern about the trust, the  
3 trust's ability or potential inability to continue to  
4 function on a go-forward basis.

5 Q. So it is not that you, you did not perform  
6 any independent economic evaluation of the trust; did  
7 you?

8 A. Um --

9 Q. Let me phrase that differently.

10 You did not perform any independent  
11 evaluation of the trust's financial condition to  
12 determine whether it would be able to satisfy its 10  
13 percent payment obligation; did you?

14 A. As a law professor my expertise is in  
15 thinking about analyzing and assessing a situation in  
16 light of the facts.

17 My role here was primarily based on looking  
18 at documents of a wide sort including those which the  
19 trust itself generated. But I have not done an  
20 independent economic analysis of the trust.

21 I have relied on the trust's own assessment  
22 and documents that reflect the assessment of others as  
23 to the trust's health or lack thereof.

24 Q. Let's take a look now at these options that  
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1 you bullet pointed on pages five and six. And we are  
2 now talking about the post-consummation period; can you

3 agree on that?  
4 A. Sorry.  
5 Q. Can we just agree that we are now talking  
6 about the post-consummation period?  
7 A. What I tell you is that these are the  
8 options that were considered post-consummation, some of  
9 them could have and may well have been considered  
10 pre-consummation.

11 But they were certainly ones that were  
12 available for consideration, which is the words that  
13 I use, they were options that were available for  
14 consideration post-consummation.

15 Q. Okay. And the first factor that you  
16 identified here as having been available for  
17 consideration post-confirmation was revising the  
18 structure of the trust itself, and you go on to say,  
19 this could include curtailing plaintiff access to the  
20 judicial system, changing the FIFO payout approach,  
21 precluding impleader actions and instituting a claims  
22 matrix; right?

23 A. Yes. That's what the first bullet provides.

24 Q. Right. Was this eventually done?

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1 A. There are a number of things that the trust  
2 did which included aspects of these, but I think it is  
3 important to recognize that they did not do these in a  
4 vacuum and they did not come upon their changes on  
5 their own.

6 Indeed other parties influenced those  
7 changes. So, some of them came out in somewhat  
8 different ways than might have happened in other  
9 situations. But there are aspects of these that were  
10 accomplished, that's true.

11 Q. Was plaintiff access to the judicial system  
12 ultimately curtailed?

13 A. Yes. One of the features of the TDP was to  
14 curtail personal injury claimants access to the tort  
15 system.

16 Q. Were impleader actions ultimately precluded?

17 A. Yes. Impleader actions which, yes were  
18 ultimately precluded.

19 Q. Was a claims matrix instituted under the TDP?

20 A. Yes. A very carefully negotiated hotly  
21 negotiated claims matrix was ultimately instituted.

22 Q. Let's look at your second bullet point, the  
23 second option that was available for consideration by  
24 the trust post-consummation.

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1 As you have it here, it says altering the  
2 timing amount and/or nature of the claims to be paid.  
3 By way of example: The time to make payments could be  
4 extended into the future with, all or a portion of the  
5 payment being made well into the 21st Century; the  
6 percentage of the claim to be paid whenssoever payment  
7 occurred could be reduced from 100 percent (the amount  
8 paid to pre-C claimants) to some other more manageable  
9 figure; and deferred payments could contain an interest  
10 component to compensate for the time value of money.

11 Did I read that correctly?

12 A. Yes, you did.

13 Q. Was this done?

14       A. Aspects of this particular bullet point were  
15       done.

16       Q. Specifically the percentage of the claim  
17       to be paid was reduced from 100 percent to a smaller  
18       number, which is currently 10 percent; isn't that  
19       right?

20       A. What's accurate is that different things  
21       happened at different points in time. There was a time  
22       period post-consummation where the amounts, some  
23       amounts were reduced, some amounts were not reduced and  
24       some amounts were reduced at varying amounts.

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1           So, I don't think there is one answer that  
2       the percentage of claims to be paid went from 100 to  
3       what you just said was 10 percent; that did not happen  
4       like that. Different claimants had gotten different  
5       percentages in different contexts post-consummation.

6           But, altering 100 percent pay out in some  
7       fashion for some claimants did occur.

8       Q. Professor Gross, you say here that pre-C  
9       claimants received 100 percent; is that right?

10      A. Yes. This indicates that pre-C claimants had  
11       been paid 100 percent.

12      Q. That is accurate, isn't it, your statement?

13      A. To the best of my knowledge pre-C claimants  
14       were to be awarded 100 percent of the amount of their  
15       allowed claim.

16           The trust was only supposed to pay the  
17       asbestos share of liability and pursuant to bankruptcy  
18       code provisions the trust can only pay if the claim is  
19       allowed. And the pre-C claimants received 100, were to  
20       receive full payment 100 percent of their allowed  
21       claim.

22           In reading the documents that I have read, it  
23       appears that the pre-C claimants did get 100 percent,  
24       although I have never done an actual assessment of

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1       whether each and every claimant him or herself actually  
2       got in his or her hands the 100 percent. That's what  
3       they were allowed, that's what the documents indicate  
4       they should have been paid.

5           I can't vouch for whether in fact each of  
6       these people has that in their hands, but there is  
7       every reason to believe that these pre-C claimants were  
8       to be paid and were paid 100 percent.

9       Q. And today trust beneficiaries receive 10  
10       percent of the scheduled values of their claims under  
11       the TDP; isn't that right?

12      A. I am sorry, could you --

13      Q. Today trust beneficiaries receive 10 percent  
14       of the scheduled value of their claims under the TDP;  
15       isn't that right?

16      A. Today, as I understand it, claimants whose  
17       claims are treated under the TDP are entitled to 10  
18       percent of the amount of their allowed claim, which is  
19       10 percent of the amount of liability that the trust  
20       has to pay these people.

21           So it is only, they are only getting 10  
22       percent of the 100 percent that they are owed from the  
23       trust for the asbestos injuries that they suffered.

24           But, I want to be very clear here, there are

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1 a group of claimants who did not get 10 percent who  
2 got more than 10 percent in a gap period between  
3 consummation and the implementation of the TDP.

4 So that the 10 percent is not everybody  
5 post-consummation, it is only one group of claimants  
6 post TDP.

7 MR. FINK: I will move to strike the latter  
8 portion of the answer as nonresponsive.

9 Q. Professor, these options that you are saying  
10 were available, that were available for consideration  
11 to the trust, is it your suggestion that these are  
12 options that should in fact have been considered during  
13 the post-consummation time frame to alleviate the  
14 trust's problems?

15 MR. MUNSON: Objection to the question, it is  
16 multiplely compound.

17 Q. Professor, we are currently focusing on some  
18 options that you have indicated were available for  
19 consideration during the post-consummation period; is  
20 that right?

21 A. Yes.

22 Q. Is it your view that these options should  
23 have been considered by the trust during that time  
24 period, the post-consummation time period?

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1 A. I think what I can say is that these are  
2 options that were available, some of which would have  
3 worked better and some of which may not have worked as  
4 well as others.

5 And what the trust had to do, I think, was  
6 make an assessment as to available options and then  
7 pursue those options that that trust thought would be  
8 most beneficial for the goals that it was trying to  
9 achieve.

10 And that means that some options are, would  
11 have been I would believe more suitable or less  
12 suitable to their situation than others, and part of  
13 their job as fiduciaries is to weigh and assess among  
14 the options which ones would be best for it in light of  
15 its situation at the time it was making those choices,  
16 with all the other parties who had to impact on those  
17 choices. That's what I think they had to do.

18 Q. In your view was reducing the percentage  
19 to be paid to claimants an appropriate step for the  
20 trust to take to address its financial situation  
21 post-consummation?

22 A. I am sorry. I just would like to hear the  
23 exact words that you used.

24 MR. FINK: Sure. Why don't you read it back,

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1 please.

2 (Record read.)

3 A. When I think about these things I can't  
4 think about one option separated from others or  
5 a-contextually. I think what I would say to you is  
6 in light of the trust's history, paying a reduced  
7 percentage may have been inevitable, but I am not sure  
8 that I would say to you just a-contextually that just  
9 reducing the number was the right or only choice.

10       Q. Professor, that is not my question and I  
11 would like you to focus on the question that I am  
12 asking, which is whether in your view reducing the  
13 payment percentage was an appropriate step for the  
14 trust to take, I am not saying the only one, I am  
15 asking whether you think it was an appropriate step for  
16 the trust today post-consummation.

17           A-N appropriate.

18        A. I thought one appropriate --

19        Q. Or if you want, the way I phrased it  
20 was, A-N.

21        A. In light of its financial situation, in light  
22 of the pressures with which it had to deal in terms of  
23 the plaintiffs' lawyers, in light of its history, in  
24 light of its need to resolve things speedily and in a  
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1 cost efficient way, and in light of the fact that it  
2 could not cure its earlier deficits, and recognizing  
3 that what it did would not fix the past, I think it  
4 was, I think a reduced payment was one of the available  
5 options to the trust.

6           So --

7        Q. Professor, again, I don't think you are --  
8           MR. MUNSON: Objection, counsel. I am sorry  
9           to interrupt you, but the witness plainly had not  
10 finished answering.

11        Q. I am sorry. I thought she had. Please  
12 finish, I honestly thought that she had.

13        A. I thought your question then at the end asked  
14 me, so was it one of the options that would have been  
15 available.

16        Q. Well, why don't you finish your answer to the  
17 previous question and then I will ask my next one.  
18 Were you done, Professor, with your answer?

19        A. I was not done with my last one, but now I  
20 have sort of, I was going to give you the very tail end  
21 answer to your --

22        Q. Please do.

23        A. -- to your question, for which I wanted to  
24 set the stage and give certain --

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1           MR. MUNSON: Professor, why don't you go  
2 ahead. If you hadn't finished, why don't you go  
3 ahead and finish.

4        A. Just read me the question again and I will  
5 give you the last part of the answer, which will  
6 incorporate the earlier part.

7        Q. Unless counsel objects, let me just do it  
8 this way. Professor, my question was not whether it  
9 was an available option, the question that I am asking  
10 you is whether in your view in light of the overall  
11 context of the trust, a reduction in the payment amount  
12 to trust claimants was an appropriate step for the  
13 trust to take, post-consummation.

14        A. With all of the things from my prior answer  
15 and what I was going to answer at the very end before  
16 is yes, in light of everything that I said before,  
17 recognizing what it could and couldn't do by doing  
18 that, reducing the payment was an appropriate step in  
19 light of the context, the people, the history and the  
20 dynamics.

21 Q. Professor, returning to your bullet points,  
22 the third bullet point, and again we are talking about  
23 options that were in your view available to the trust  
24 for consideration post-consummation, the next option is  
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1 obtaining judicial intervention.

2 And you go on to say, this could include  
3 returning to the bankruptcy court, which it handled the  
4 Johns-Manville Chapter 11 case and entered the order  
5 confirming the plan of reorganization.

6 Another option you say could be developing a  
7 class action and then seeking its approval before a  
8 judge. Have I read that correctly?

9 A. Yes, that's what the third bullet says.

10 Q. All right. In fact, the trust's options were  
11 ultimately restructured through a class action  
12 settlement; were they not?

13 A. Ultimately, what happened was that the last  
14 sentence there, another option could be developing a  
15 class action and then seeking its approval before a  
16 judge, it is that last sentence which was the approach  
17 that was taken.

18 Q. And that was a form of obtaining judicial  
19 intervention, was it not, or a way of obtaining  
20 judicial intervention?

21 A. Yes. That is, the general category is  
22 judicial intervention. And one way of obtaining  
23 judicial intervention in this case was through the  
24 class action vehicle.

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1 Q. And the class action vehicle was the  
2 mechanism that was in, which was in fact used here for  
3 obtaining judicial intervention; correct?

4 A. Yes, it ultimately was the vehicle.

5 Q. Let's turn to your next bullet point, the  
6 next option in your view available to the trust for  
7 consideration post-consummation.

8 You describe that option as pursuing other  
9 assets or improving existing asset management.

10 And then you say by way of example, there  
11 could be an early sale of some or a controlling  
12 interest in the Johns-Manville stock held by the trust  
13 and an additional voluntary contribution from  
14 Johns-Manville, increased trust involvement in the  
15 operation of Johns-Manville, and maximizing or  
16 obtaining prepayment of assets obtained from  
17 Johns-Manville. Did I read that correctly?

18 A. Yes. You did.

19 Q. Did the trust post-consummation pursue other  
20 assets or improve existing asset management?

21 A. I would say it, did it in some ways and not  
22 in others?

23 Q. The trust in fact considered a number of  
24 different transactions in order to improve its existing

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1 assets and to improve its management of those assets;  
2 did it not?

3 A. The lead in to your question? Sorry.

4 Q. Isn't it a fact that post-consummation  
5 the trust considered a number of different forms of

6 transactions to improve its asset management and to  
7 enhance its asset base?

8 A. My reading of the trust internal documents  
9 indeed suggests that they considered ways of improving  
10 how assets were handled; yes.

11 Q. And they ultimately implemented some of those  
12 alternatives; did they not?

13 A. There were a number of options available to  
14 the trust. They picked and chose certain things to do  
15 which necessarily meant they did not do other things.

16 But they chose to do certain things related  
17 to improving existing asset management, yes, they did  
18 that.

19 Q. You would agree with me would you not that  
20 the trustees as fiduciaries are indeed required to  
21 choose among different, many, many different options  
22 that are available to them with regard to significant  
23 matters such as managing the trust's assets?

24 A. The trustees of this trust were fiduciaries

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1 and they were obligated to try to deal with and improve  
2 existing asset management. Whether they considered all  
3 of the options, I can't speak to that.

4 Their documents indicate that they thought  
5 about certain ways of improving the trust, and they  
6 picked and chose among what they took to be the  
7 options, recognizing that in picking some and not  
8 picking others certain benefits and burdens came from  
9 those choices.

10 That's their job to do that, whether they  
11 made the best and the right choices is a different  
12 issue.

13 Q. Okay, Professor.

14 I think my question is a different one.

15 The question is, whether you would agree  
16 with me that the trustees as fiduciaries were indeed  
17 obligated to select among the various choices available  
18 to them for improving the management of the trust's  
19 assets?

20 A. I think what I would say to you is as  
21 trustees their job was to develop the plan', the group  
22 of options and then evaluate them and as fiduciaries to  
23 pick and choose among them.

24 But these trustees were being simultaneously

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1 influenced by another group of people that impacted on  
2 their decision making.

3 And that is very important to keep in mind  
4 here because the way this trust was structured, these  
5 trustees were not acting in isolation. This trust was  
6 connected to a plan which gave another group of people,  
7 namely the plaintiffs' lawyers, influence and impact on  
8 that trust and that decision making in many respects.  
9 And so, they couldn't just go off as fiduciaries on  
10 their own in a vacuum.

11 They had these other influences that impacted  
12 on what they did.

13 And so, in answering your question, I have  
14 to say that they had to act as fiduciaries, but they  
15 weren't acting alone.

16 MR. FINK: I will move to strike everything

17 after the word but, which came about two or three  
18 sentences into your answer, as nonresponsive.

19 Q. Professor, I will just state for the  
20 record that your counsel and I have discussed, you  
21 know, time limitations that they want to impose on this  
22 deposition, pursuant to practice in this case, and I  
23 think it would be helpful if you could try to limit  
24 your answers to the questions that I have asked, and

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1 you are going to have an opportunity to testify perhaps  
2 at trial, your counsel will ask you questions and you  
3 will have an opportunity to say everything you want  
4 to say.

5 But, I don't think your embellishments --  
6 well they are certainly not going to speed this process  
7 up.

8 Focusing on the next bullet point, which  
9 is in your view as you have laid them out here, the  
10 next option that was available to the trust for  
11 consideration post-consummation, you describe it as  
12 improving the internal management of the trust, this  
13 could include replacement of trust management. Have I  
14 read that correctly?

15 A. Yes, you have.

16 Q. Was that done?

17 A. There was a change in trust, in certain of  
18 the people managing the trust and there also was a  
19 change in who was serving as trustees. That did happen  
20 factually, that those changes were made. But the trust  
21 did not make them all on its own.

22 Q. Professor, your next and final bullet point  
23 outlining the options available to the trust for  
24 consideration post-consummation talks about seeking a

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1 bankruptcy for the trust itself; is that right? There  
2 is more language there, but that is the topic?

3 A. Yes. There is more language there, but one  
4 of the things that I indicate is a bankruptcy of the  
5 trust's itself.

6 Q. And to be complete, and accurate, I should  
7 point that you say, or a receivership.

8 A. Or actually an involuntary bankruptcy, which  
9 is an important difference because one is the trust  
10 choosing to go into bankruptcy, and the other is people  
11 forcing it into bankruptcy.

12 Q. Fair enough. Later in this paragraph you  
13 have a parenthetical which says assuming eligibility;  
14 do you see that?

15 A. Yes.

16 Q. Do you know, Professor, whether or not the  
17 trust is eligible for bankruptcy?

18 A. I have read various documents in which  
19 lawyers to the trust and I believe other lawyers  
20 offered their respective views. I have not been asked  
21 to issue any legal opinion on whether I think the trust  
22 is or was eligible for either a voluntary or an  
23 involuntary bankruptcy.

24 Q. Professor, you are holding yourself out in

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1 this case, are you not, as an expert in bankruptcy law?

2       A. Yes, I am.

3       Q. Okay. Professor, as an expert in bankruptcy  
4 law can you answer the question whether or not the  
5 trust is eligible for bankruptcy?

6       A. I certainly know the requirements for  
7 eligibility and I am very familiar with the issues that  
8 were raised in the various opinions by very well known  
9 law firms, in which they debated the topic about  
10 whether the trust was or was not eligible for either a  
11 voluntary or involuntary bankruptcy.

12       And unless I were to sit down and carefully  
13 assess that specific question -- I would not even as an  
14 expert, and by the way someone who writes about  
15 involuntary bankruptcies for the leading bankruptcy  
16 treatise, I wouldn't right now give you my opinion on  
17 that.

18       That is a very difficult issue as those  
19 lawyers themselves pointed out and I can certainly  
20 raise the arguments for you and explain where the legal  
21 difficulties rest. But right now, I don't think it is  
22 appropriate for me to give you my opinion on that  
23 issue.

24       Q. Is it fair to say, Professor, that as we

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1       sit here today, you do not currently have an opinion  
2 on whether or not, whether or not the trust is eligible  
3 for bankruptcy or was eligible for bankruptcy  
4 post-consummation?

5       A. Actually, I don't think that is fair to say.

6       I think what's fair to say is that I have  
7 thought about it, I understand very well the issues  
8 that are raised, I have read the opinions of the law  
9 firms that debated this for the trust.

10       But I have not, and by the way, I understand  
11 the difficulty that confronted the trust in trying to  
12 assess whether that was or was not the right option.

13       I have done all that. But what I have not  
14 done is I have not rendered my opinion on that question  
15 and I have not done that, not only because I was not  
16 asked to do that but because to do that would require  
17 that I look at very, very detailed facts, at very  
18 detailed facts, myself, not relying on other lawyers,  
19 very detailed facts myself that would help me decide  
20 this very hard question.

21       And that particular part, the development and  
22 looking at very specific facts that would help me make  
23 that, I have not done that.

24       Q. So, Professor, with all that background

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1       isn't it fair to say that as you sit here today without  
2 having done, well --

3           Strike that.

4       Professor, isn't it fair to say that as you  
5 sit here today you have not formed an opinion whether  
6 or not the trust is eligible for bankruptcy?

7       MR. MUNSON: Objection. Asked and answered,  
8 counsel; three times.

9       MR. FINK: I would like to hear the answer.

10       MR. MUNSON: If you have anything different  
11 to say, Professor, if you have something  
12 different. You have been asked the question

13       several times. If you have something different to  
14       say, say it. If you don't, just say you don't  
15       have anything different to say so that we can  
16       move on.

17       A. Um, I would repeat what I just said about  
18       what I have done, what I have thought about and what I  
19       am able to say.

20       Q. Professor, I am going to ask you now to turn  
21       to page 7. The heading there is basis three. We are  
22       looking at your supplemental report.

23           Are you with me, Professor, on page 7?

24       A. Yes, I am.

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1       Q. If you look with me, and why don't we start  
2       with the first sentence, when the final TDP was reached  
3       in 1994, and became operative in early 1995, the trust  
4       was far from being solely responsible for its  
5       contours.

6           And then you go on to say, rather the  
7       ultimate choices reflected an effort to address the  
8       powerful influences of the plaintiffs' lawyers and then  
9       you go on to identify some other constituencies.

10          My question to you is when you refer there to  
11       the ultimate choices, what are you referring to?

12       A. Again, just give me a second to place basis  
13       three in the context of the whole opinion.

14       Q. Absolutely.

15       A. This is referring to the choices that got  
16       made and were reflected in the TDP, for purposes of  
17       resolving the issues that were in the class action.

18       Q. Professor, you agree with the statement do  
19       you not that the TDP overcame certain of the trust's  
20       original structural defects?

21       A. Yes. I would agree that there were certainly  
22       things it could not do, but there were ways in which  
23       the trust did overcome certain of the original defects;  
24       yes.

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1       Q. Professor, on the bottom of page 7, looking  
2       at the last paragraph and actually the carry over  
3       sentence that starts at the bottom of page 7, you say,  
4       as such the resolution in the TDP created some new  
5       although not unanticipated consequences including, and  
6       then you go on to enumerate three consequences; is that  
7       correct?

8       A. Yes. That's what it says.

9       Q. Okay. And the first of these consequences  
10       you say is, and there is a bullet point, start up costs  
11       to enable TDP implementation and then you say  
12       parenthesis, which meant revamping how claims had been  
13       settled and paid previously, and then the parenthesis  
14       end; is that right?

15       A. Yes. That's what it says.

16       Q. Have you ever made any effort to quantify  
17       what the TDP start up costs were?

18       A. In making my statement here in this report,  
19       what I did is I looked at a variety of documents that  
20       the trust itself had generated. So, I am aware that  
21       there were costs, it was not my particular task to  
22       quantify those costs.

23       Q. Am I correct in understanding that you did

24 not quantify the TDP start up costs?

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1 A. It is correct that other than assessing  
2 their, other than determining their existence, I have  
3 not quantified the exact dollar amount of them, that is  
4 correct.

5 Q. Is it your opinion that the TDP start up  
6 costs whatever their amount have some effect on the  
7 amount that the trust is entitled to recover, if any,  
8 from the tobacco industry in this case?

9 A. I am sorry. Could you repeat the question.

10 Q. Let me phrase it differently.

11 In the event that the trust were to obtain a  
12 recovery from the tobacco industry in this case, is it  
13 your view that the TDP start up costs have any  
14 relevance to the amount of that recovery?

15 A. Let me start by saying that I don't assume  
16 that the tobacco companies owe anything to the trust.

17 But one of the things that would have to be  
18 taken into account in assessing how the trust got to  
19 where it is and why it is in the jam that it is in is  
20 that you have to look at every piece of how it got to  
21 be where it is, because that accounts for why it  
22 doesn't have the money now to pay its claimants more  
23 than 10 percent.

24 And there are a lot of things you would look

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1 at to make that assessment. Um, and one of them would  
2 be the start up costs.

3 Q. Professor, again, I am not sure you have  
4 answered my question, which is: Whether in your view  
5 in the event that the trust obtains a recovery from the  
6 tobacco industry these TDP start up costs would be  
7 relevant to the amount of that recovery?

8 MR. MUNSON: Objection. Asked and answered.

9 MR. FINK: No. I did not understand it to be  
10 answered, but --

11 If your answer is yes, I guess that would  
12 help.

13 MR. MUNSON: I object to your argument with  
14 the witness. Professor, if you have already  
15 answered the question, fine. If you have  
16 something further to say, that's fine, but --  
17 You don't have to answer it again.

18 A. There is nothing I would change in my prior  
19 answer. I stand on the answer that I gave before.

20 Q. Is that answer a yes?

21 MR. MUNSON: Objection. You are arguing with  
22 the witness.

23 MR. FINK: I am trying to understand the  
24 testimony, counsel.

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1 A. Is it possible to read back my answer?

2 Q. No. I would just like to know whether or not  
3 the answer is a yes? I suppose if you need to hear it  
4 to do that, you are entitled to hear it if you would  
5 like.

6 MR. MUNSON: I object to your arguing with  
7 the witness, and I object that the question has  
8 been asked and answered.

9 Professor, if you have something to add to  
10 your answer, you are free to, but if you have  
11 already answered the question to the best of your  
12 ability, you are free to say that.

13 A. I have nothing further to add in respect of  
14 this question.

15 Q. Professor, your next bullet point here for a  
16 new although not -- new although not unanticipated  
17 consequence of the TDP, is uniformity of recovery by  
18 categories of claimants meeting certain criteria; is  
19 that right?

20 A. Yes. That is correct.

21 Q. Is this uniformity of recovery in your view a  
22 good thing or a bad thing?

23 MR. MUNSON: I will object to the question,  
24 the grounds that it is ambiguous; good or bad, to

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1 whom or for.

2 Q. Is it good or bad in Professor Gross' view?

3 A. Well, first of all, let me start by saying  
4 that what this is referring to is quite specific. It  
5 is uniformity of recovery by categories of claimants  
6 meeting certain criteria.

7 And my answer to your question is that I am  
8 what I would call value neutral as to this. It has  
9 some positive aspects and it has some negative  
10 aspects. I don't form a view one way or the other as  
11 to whether it is good or bad, it is what happened.

12 Q. Okay. Professor, your next bullet point here  
13 describing a new, although not unanticipated  
14 consequences, including: -- of the TDP is reduced  
15 payments to personal injury plaintiffs (from 100  
16 percent for pre-C claimants to 10 percent for post TDP  
17 claimants) with some delay in the timing of repayment;  
18 is that right?

19 A. Yes. That is a correct reading of the bullet  
20 point three.

21 Q. And do I understand from your prior testimony  
22 that you consider that to be a good thing that the  
23 payments were reduced?

24 A. I never said I don't believe that it was a

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1 good thing. I think what I said, and I believe what I  
2 said is that it was an inevitable thing in light of the  
3 financial jam that the trust was in.

4 And I think I also said that it was one of  
5 the options that was employed to try to prospectively  
6 address the trust's huge financial deficits, and I also  
7 said to you that I did not think it cured its earlier  
8 deficits. So, I don't think I said that it was to use  
9 your words "good."

10 Q. Professor, in the next paragraph you go on to  
11 say, do you not, that the TDP addressed certain of the  
12 trust's deficits, but that unresolved issues remained.

13 A. Actually, quite specifically, what I said is  
14 that not only did the TDP not resolve certain things,  
15 it couldn't resolve certain things. So, it is both  
16 that it did not do it, but it also was not capable of  
17 doing it.

18 Q. Then you go on to enumerate four of what you  
19 characterize as unresolved issues, as unresolved

20 issues.  
21 A. Well, I have four bullet points, which some  
22 of which have sub-parts within them, yes, four major  
23 bullet points.

24 Q. Each of which is a major category of

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1 unresolved issues in your view?

2 A. Well, what this list of four bullet points  
3 is, some of, it is not an exclusive, but it is a list,  
4 the lead in, the unresolved issues include, and I have  
5 listed four.

6 Q. What additional unresolved issues that are  
7 not listed here do you believe pertain?

8 A. I would say that the other issues that I have  
9 thought about are more speculative in nature than ones  
10 as to which I have certain views, but they don't change  
11 or alter or affect the analysis that I have given  
12 here.

13 Q. Fair enough. Let's focus on the four  
14 unresolved issues that you have identified here.

15 The first bullet point says that the total  
16 number of claims against the trust far exceeded that  
17 which was anticipated in the plan disclosure  
18 statement. Then you go on to say that the trust  
19 continues to see a monthly influx of new claims.

20 Did I read that correctly?

21 A. Yes.

22 Q. In what sense is the total --

23 In what sense has the TDP not addressed the  
24 total number of claims against the trust?

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1 MR. MUNSON: Objection to the form.

2 It assumes that the, you are making an  
3 assumption about her report that I don't think is  
4 a fair characterization. But you can answer, if  
5 you can.

6 Q. I would be interested to know what the  
7 problem with the question was.

8 MR. MUNSON: That's okay. Go ahead, if you  
9 can answer.

10 A. What I am trying to point out here is that  
11 the TDP resolved certain specific identified problems  
12 and was a way of trying to resolve those so the trust  
13 could continue to function, because it became very  
14 clear that it was dysfunctional, not functional.

15 The TDP does not address what will happen or  
16 how to resolve, what the TDP doesn't do is it doesn't  
17 necessarily solve the problem of what to do if claims  
18 continue to grow much more rapidly or change in the way  
19 that they come about.

20 The TDP solves a set of problems, it is not a  
21 solution in perpetuity for everything. And so, what I  
22 tried to do here is identify things that remained for  
23 me open issues, notwithstanding the TDP.

24 In other words, the TDP solved a group of

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1 issues, it doesn't mean it solved everything in  
2 perpetuity.

3 Q. Understanding that your view is that the  
4 TDP did not resolve everything in perpetuity, well --

5 Let me ask you something different.  
6

7 Is it your understanding that the trust  
currently pays its claimants 10 percent?

8 A. From what I have read and from the documents  
9 that I have looked at, yes, the TDP appears to be  
10 paying 10 percent of the allowed claim and of the  
11 claimants, which means that the TDP is paying 10  
12 percent of the asbestos liability of people who have  
13 been injured, were injured.

14 Q. And do you have an understanding as to  
15 whether or not the TDP has a provision that permits for  
16 that 10 percent amount to be adjusted in the event that  
17 the trust projected liabilities turn out to be  
18 different from its actual liabilities?

19 A. Yes, I am aware that it has such a provision,  
20 that in some respects deals with what to do if claims  
21 go --

22 Let me state it more clearly.

23 There is a provision in the TDP related to  
24 adjusting that 10 percent upward or downward as may be

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1 needed.

2 Q. Okay. Given that provision in the TDP, my  
3 question to you is how the TDP does not resolve the  
4 issues raised by the total number of claims against the  
5 trust as identified in your first bullet point here.

6 A. There are two ways in which this bullet point  
7 remains accurate, one is retrospective and one is  
8 prospective. Retrospectively, looking back the TDP  
9 could not fix the fact that the number of claims far  
10 exceeded anything which the trust anticipated and  
11 hence can't fix, the TDP can't fix the fact that some  
12 claimants got paid in full 100 percent of their allowed  
13 claim and other claimants haven't.

14 As to the prospective part of it -- one can't  
15 as much as the TDP has in it a provision for adjusting  
16 pay-outs upward or downward, should there be a dramatic  
17 shift the TDP may not be in a position prospectively  
18 either to function well or to, to function well or to  
19 function in the manner that it is required to function  
20 to be in compliance with the bankruptcy law  
21 provisions.

22 I can't say that yet, I don't know what will  
23 happen in the future. So, for me there are both  
24 retrospective and prospective issues that remain

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1 unresolved.

2 Q. With respect to the retrospective issue as  
3 you identified it, that is addressed in your second  
4 bullet point, here; is it not?

5 A. Actually, the first and the second bullets  
6 are discussing related but not identical issues. They  
7 are going at somewhat different more subtle, a subtle  
8 distinction which I am happy to make for you.

9 The first bullet is going to the aggregate  
10 number of claims, the total number of claims. The  
11 second one is going to the fact that within that big  
12 number some particular group got specifically  
13 identified to get paid more than another group.

14 And that is an important difference. One  
15 goes to the overarching number of claimants, the second

16 part goes how they picked and chose among those as to  
17 which would get paid how much and certain specific  
18 subgroups of claimants were able to get more of the  
19 limited pot than others.

20 That's a difference between bullet point one  
21 and bullet point two, among other differences.

22 Q. With respect to what you described as the  
23 prospective element of the first bullet point, do you  
24 think it is a good thing or a bad thing that they, the

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1 TDP provides that the 10 percent payment can be  
2 adjusted if necessary to equalize payments among trust  
3 beneficiaries?

4 A. Asking you what is good or bad depends on  
5 what is good or bad, from whose perspective and what  
6 purpose I am assessing good or bad. And there are lots  
7 of ways of assessing good or bad.

8 Q. Professor, don't go through in your two  
9 reports and critiquing eventually the trust and its  
10 operations?

11 A. In my reports, I critique lots of things, I  
12 critique the trust and its operations, but I critique  
13 its structure. I critique the influence, who  
14 influenced it, I critique how it got created, I  
15 critique how it made the choices it made and did  
16 not make. I critique a number of features of which you  
17 have just mentioned two.

18 Q. Okay. You raise various alternatives  
19 throughout your reports in terms of ways that the trust  
20 could have improved upon itself; do you not?

21 A. Well, what I lay out are options that were  
22 available to the trust.

23 Um, recognizing the situation it was in and  
24 all of the influences with which it had to deal. And I

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1 think what I indicate in my reports is that I set out  
2 the options and then the trust made its own assessment  
3 of options, and which ones to choose and which ones not  
4 to choose and the strengths and the weaknesses of those  
5 choices in light of its situation. I think that is  
6 what I do.

7 Q. Professor, do you think that attempting  
8 to equalize the payments of the percentage pro rata  
9 percentage of payment that the trust's beneficiaries  
10 will receive from the trust is appropriate?

11 MR. MUNSON: Objection to the question, it is  
12 ambiguous. I don't know what you mean by equalize  
13 payments.

14 Q. The pro rata payment percentage.

15 A. Do you want to just read me the question  
16 back.

17 Q. Professor, my question, you criticize the  
18 trust for having paid certain claimants 100 percent and  
19 paying other claimants a smaller amount; do you not?

20 A. Critiquing is your word and not mine.

21 What I would tell you is that my expertise  
22 tells me that bankruptcy is designed to accomplish  
23 certain things and one of those is fair and equitable  
24 treatment of, fair and equitable treatment of

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1 creditors.

2 What my reports tell you is that the trust  
3 did not do that. And it did not do that because it  
4 singled out certain groups of creditors to be paid  
5 earlier, sooner and more than other groups of  
6 creditors.

7 And that is what my report tells you.

8 And it also tells you that when it got into  
9 this terrible jam where it couldn't pay everybody, it  
10 had to make certain adjustments and that in doing that  
11 it may have tried to fix a situation, but it couldn't  
12 fix it completely.

13 There was no way in many respects to fix a  
14 fundamental flaw, and so what I am telling you is that  
15 the fair and equitable treatment of creditors, which is  
16 a requirement of the bankruptcy law, was something that  
17 the trust did not do and still cannot do.

18 Q. Professor, let me rephrase my question then.

19 In your view is the TDP provision that allows  
20 for the 10 percent pro rata payment to be adjusted  
21 in the event that the trust's projections of its  
22 liabilities over time turns outs to be inaccurate, in  
23 furtherance of the goal of fair and equitable treatment  
24 of creditors?

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1 A. There is what I would call short-term  
2 improvements versus overall systemic solutions.

3 What was done in the TDP was to try to fix  
4 a problem in a short-term way recognizing the things,  
5 that things had not gone well and recognizing lots of  
6 things that contributed to the deficiencies of the  
7 trust.

8 That fix lowering the percentage of pay out  
9 helps to solve a terrible situation. It doesn't fix  
10 though the big overarching problems, so what we have is  
11 an effort to resolve on a short-term type of basis, a  
12 problem, but you have to recognize that it doesn't fix,  
13 doesn't go back and fix the whole set of problems.

14 Q. Professor, in what respect is the TDP a  
15 short-term fix?

16 A. Perhaps I could have chosen a better word  
17 than short-term fix. I would perhaps replace it with a  
18 current fix.

19 The trust faced a crisis and something had to  
20 be done and this the TDP was the way of fixing that  
21 crisis. And in ways it fixed it, and in other ways it  
22 left new issues. But what it did not do and what it  
23 couldn't do is it couldn't go back in time and fix a  
24 long history and very complicated and entrenched

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1 problems that existed.

2 Q. Okay. With that, let's return to our  
3 discussion of the TDP provision that allows the 10  
4 percent pro rata share to be adjusted upward or  
5 downward in the event that the trust's projections of  
6 its liabilities turns out to be inaccurate.

7 MR. MUNSON: Counsel, we have been going  
8 about an hour and 20 minutes, I would like to take  
9 a short break.

10 MR. FINK: Okay, counsel. I would have  
11 preferred that you not interrupted me in the

12 middle of a question. But let's go off the  
13 record.

14 MR. MUNSON: I thought you were at a  
15 convenient time. If you want to go ahead, we  
16 could -- I would assume that you finish a topic  
17 before we break, and if you are going to do it  
18 relatively soon, let's continue on the record.

19 MR. FINK: Let's stay on the record.

20 Q. Professor Gross, we have been discussing  
21 intermittently the TDP provision that permitted for the  
22 10 percent pay out to be adjusted upward or downward  
23 in the event that the trust's projection of its  
24 liabilities turned out to be inaccurate.

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1 Would you agree with me about that? Are you  
2 familiar with the TDP provision that I am talking  
3 about?

4 A. There are lots of parts of your questions  
5 to agree with or disagree with. I do know that I am  
6 familiar with the TDP provision to which you are  
7 referring but --

8 Q. That's all I want to know. I want to make  
9 sure that we are on the same ground. Is that TDP  
10 provision consistent with the goal of fair and  
11 equitable treatment of creditors?

12 MR. MUNSON: Objection. Asked and answered.

13 That was your immediately preceding  
14 question.

15 Q. No, my preceding question was if it was  
16 in furtherance of, and I don't believe it was ever  
17 answered. I would like an answer.

18 MR. MUNSON: Your distinction, one  
19 question was in furtherance of, the other question  
20 was what --

21 Q. Whether it was consistent with -- and I don't  
22 believe it was answered.

23 MR. MUNSON: Just so I understand the  
24 differences in your question. One question was

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1 whether it was in furtherance of and one question  
2 was whether it was in --

3 MR. FINK: That was the difference in the  
4 question, aside from the fact that it was --

5 I don't think it was ever answered.

6 MR. MUNSON: Do you understand the question  
7 that is in front of you right now?

8 THE WITNESS: I don't understand the  
9 difference between this question and the last  
10 question.

11 A. Maybe what I would say to you is that the TDP  
12 is an effort to solve a problem. Because of the  
13 magnitude of the problem it is not a perfect solution.  
14 And among the options is it better to try at a certain  
15 point in time to make sure that at least some group of  
16 creditors is treated the same as each other, yes.

17 But is it optimal that some people get a 100  
18 and some get 10, and some get one and some get 40, no,  
19 that is not optimal.

20 So, I guess what I would tell you is for me  
21 the TDP was a negotiated effort with lots of parties  
22 participating to come up with a solution to a very bad

23 situation. But, it is not perfect and it doesn't fix  
24 the past; that's what I tell you.

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1 Q. Okay, Professor, I appreciate all that.  
2 I would appreciate an answer to my question  
3 which is whether the, not the TDP overall, but whether  
4 the TDP provision that we have been discussing is  
5 consistent with the goal of fair and equitable  
6 treatment of creditors?

7 A. I think what I have said to you, and I am  
8 just repeating now, in some ways it is and in some ways  
9 it is not.

10 Q. In what way is that specific provision,  
11 not the TDP as a whole, in what way is that specific  
12 provision not consistent with the goal of fair and  
13 equitable treatment of creditors?

14 A. There are several ways in which it is not,  
15 but I will give you one example.

16 Fair and equitable treatment assumes that  
17 whenever claimants are paid over the course of time if  
18 they are similarly situated they will get paid the same  
19 amount.

20 It shouldn't matter when you are injured, if  
21 you are entitled to be paid everybody should be paid an  
22 amount, the same amount. In other words, future  
23 claimants are entitled to the same amount for their  
24 injury as those who are injured earlier. And they

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1 shouldn't get less by the accident of time.

2 And what this provision means as implemented  
3 is that some people by the accident of time will get  
4 paid more and other people will get paid less.

5 That's not what fair and equitable meant, in  
6 the bankruptcy code, it meant all similarly situated  
7 creditors will be paid a like amount for their injuries  
8 and that is not happening.

9 And that provision, which shifts the amount  
10 people can be paid while it has certain benefits does  
11 not enable all creditors to be paid equally whenever  
12 their injury arose.

13 Q. Professor, is it your view that it would be  
14 more consistent with the goal of fair and equitable  
15 treatment of creditors for the TDP to lock in a 10  
16 percent payment percentage regardless of what  
17 eventuates in the future?

18 A. I am not going to speculate on what other  
19 provision. This was a negotiated settlement and there  
20 were trade offs for why they got what they got and why  
21 they did certain things versus certain other things.

22 So, I would not want to speculate as to --

23 (Phone ringing).

24 THE WITNESS: Should I keep --

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1 Q. Go ahead.

2 A. I wouldn't want to speculate as to what  
3 other provision they might have employed or what the  
4 strengths or weaknesses of some other provision, what  
5 we have got is a provision now in an agreement that was  
6 negotiated. And my comments are addressed to whether I  
7 think that provision and its operation supports fair

8 and equitable treatment.

9 MR. MUNSON: Counsel, why don't we stop now  
10 so that we can turn off the phone (A), and (B) to  
11 take a short recess.

12 MR. FINK: Fair enough.

13 THE VIDEOGRAPHER: We are now going off the  
14 record and the time is 11:43 a.m.

15 (Recess).

16 THE VIDEOGRAPHER: Stand by, please.

17 We are now going on record, the time is  
18 12:02 p.m.

19 Q. Professor Gross, I would now like to turn  
20 to your third bullet point identifying what you have  
21 referred to as unresolved issues or issues unresolved  
22 by the TDP.

23 And that bullet point says a significant  
24 number of claimants had their claims settled without  
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1 adequate or accurate information, meaning that their  
2 ultimate pay out was inappropriate. Did I read that  
3 correctly?

4 A. Yes, you do.

5 Q. What time period are you making reference to  
6 in this bullet point?

7 A. My reading of the documents suggests  
8 that there was a difficulty with claims settlement in  
9 terms of both adequacy and accuracy of information that  
10 ran from actually pre-consummation, but ran from  
11 post-consummation as well forward in time.

12 And the TDP did not fix what happened  
13 before it went into effect, and it did not fix claims  
14 resolution in these respects even after it went into  
15 effect.

16 So, it actually covers a very long period of  
17 time.

18 Q. Have you made any effort to quantify the  
19 extent to which the ultimate pay out was inappropriate  
20 in your view?

21 A. I have looked at a number of documents which  
22 have indicated deficiencies in the claims resolution  
23 process, internal documents to the trust indicating  
24 concern about this. But I have not specifically

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1 quantified in a collective way the dollar amount that  
2 those deficiencies yielded.

3 As a law professor that quantification is  
4 not something that I do, I have a task of looking at  
5 facts and then analyzing it, assessing it, evaluating  
6 it and making my best professional judgment as to what  
7 it means; and I have left quantification to someone  
8 else.

9 Q. Professor, on page 9 of your report the  
10 first full paragraph, is this paragraph an effort to  
11 summarize the opinions that you have reached in this  
12 supplemental report?

13 A. Once again, let me just reread the  
14 paragraph.

15 Q. Please do.

16 A. I am sorry. Could you now, now that I have  
17 looked at the paragraph, would you reread your question  
18 to me.

19       Q. I can't read it but I can restate it.  
20           And the question is simply, whether this  
21 paragraph is an effort to summarize the opinions that  
22 you have set forth in this supplemental report?  
23       A. I would characterize this paragraph a little  
24 bit differently than that. I would say that this  
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1       supplemental report is linked to the first report, in  
2 very significant ways, and what the first report talked  
3 about amongst many things is with lots of opinions  
4 within the major categories was whether the purposes of  
5 Chapter 11 had been fulfilled.

6           And what this paragraph is addressing is  
7 whether in this new time period that this supplemental  
8 report covers how are those two identified purposes of  
9 Chapter 11, which remained important, what happened to  
10 them in this next period.

11          That's what this is getting at. And the  
12 support from my answer to that is everything that  
13 appears in the pages preceding that.

14          So, what this paragraph is doing is it is  
15 applying what comes before it to the purposes that were  
16 developed and analyzed and assessed in the first report  
17 and now moving them forward in time, asking in light of  
18 everything here what happened to those two purposes.

19       Q. Professor, I am correct am I not in  
20 understanding that your first report addresses four  
21 categories of opinions, if you will.

22       A. It has four overarching questions and lots of  
23 sub-questions that had to be asked and answered to  
24 answer the big four questions; yes.

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1       Q. Fair enough. If you look at pages 2 and 3 of  
2 your original report.

3       A. The original one?

4       Q. Yes. You will see that the paragraph that  
5 carries over from page 2 to page 3 sets forth in  
6 general what those four, I think you called them large  
7 questions, what those four questions are.

8       A. Yes.

9       Q. My question to you is, does your supplemental  
10 report attempt to address in any manner the subject of  
11 the third question, which is in light of what was known  
12 pre-consummation about the financial condition of the  
13 trust what if anything should have happened before  
14 consummation occurred?

15       A. In a sense the second report also touches  
16 on that question, because you can't figure out what  
17 happened at the end of the day if you don't go back and  
18 figure out how you got there.

19       And so, the second report recognizes and  
20 acknowledges and deals with things that did occur  
21 before consummation, because it is only if you  
22 understand those that you can understand what happened  
23 post-consummation.

24           So, I would answer your question that there

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1       are aspects of number three there that do impact on my  
2 assessment in the supplemental opinion.

3       Q. Okay. But I think my question is a

4 different one, which is whether your supplemental  
5 opinion discusses the topic raised by question number  
6 three.

7 A. It does not do it as directly as the  
8 first report. Some of it is contained early on in the  
9 second report, where I talk about what was known  
10 pre-consummation.

11 Q. Can you point me to the portions of your  
12 supplemental report that address question three?

13 A. I would say some of the material on page 3  
14 and the top of page 4 go to those issues.

15 Q. Can you point me specifically to what  
16 portions you are talking about?

17 A. Question three, which is the one you are  
18 referencing is in the original opinion at about pages  
19 through 22.

20 Q. I did not mean to cut you off.

21 I am asking in the supplemental report if you  
22 can point me to the language in the supplemental report  
23 that addresses question three?

24 A. I am showing you that because the second,  
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1 supplemental report specifically cross references the  
2 third opinion by page number and it is in the language  
3 on page 4 at the top, that says both the trust staff  
4 and the selected beneficiary counsels knew as described  
5 in the expert report at pages 16 to 17 and 19 to 21,  
6 about the trust's mismatch between assets and  
7 liabilities before consummation.

8 And the lead in to that also talks about the  
9 decisions and choices made and not made by the trust in  
10 respect of the claims that exacerbated its financial  
11 plight.

12 So there are aspects of this supplemental  
13 opinion that are drawn from, rest on, as a backdrop to  
14 that which is done here in the second.

15 Q. Looking back to your original report for  
16 a moment, page 3, question 4 -- if I can try to  
17 characterize it and correct me if I am wrong, is you  
18 are discussing what were the most important reasons why  
19 neither Manville nor the trust at any time before this  
20 lawsuit was brought, brought an action against the  
21 tobacco industry; is that basically right?

22 A. Well, this is asking a question in two time  
23 frames, the debtor and the trust not pursuing claims  
24 against the tobacco companies pre-consummation and then

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1 the trust not pursuing claims post-consummation until  
2 implementation of the TDP.

3 So, it is discussing two different time  
4 periods.

5 Q. With that explanation, is question four  
6 addressed anywhere in the supplemental report?

7 A. Yes. It is addressed in the second report,  
8 not at the length that it is discussed in the first  
9 report, but in the context of considering the options  
10 that were available to the trust and the options that  
11 it had to assess and consider post-consummation, it is  
12 one of those options and is referenced in the second  
13 supplemental report.

14 Q. Can you point the reference to the

15 possibility of the trust suing the tobacco company in  
16 the supplemental report?

17 A. Yes. There were several general references,  
18 but the specific one that is right in front of me is  
19 the one on page 5 at the bottom, and this is in the  
20 context of talking about what options were available  
21 for consideration by the trust and among the options  
22 that were available included, and then at the bottom of  
23 the page fourth bullet point pursuing other assets is  
24 the language.

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1 Q. So, you view a suit by the trust against the  
2 tobacco industry as being one way that the trust could  
3 pursue other assets; is that right?

4 A. I am sorry. I --

5 Q. Can you just read that back.

6 (Record read.)

7 A. I think one thing that the trust had to  
8 consider is whether it had an asset and if it did  
9 whether it should pursue it and whether it was worth  
10 pursuing.

11 And when one thinks about this, as a  
12 bankruptcy expert the term assets can include causes  
13 of action if they existed.

14 Q. This lawsuit, the False versus American  
15 Tobacco Company case is an effort by the trust to  
16 pursue additional assets for distribution to its  
17 beneficiaries; isn't it?

18 A. I would characterize this lawsuit  
19 somewhat differently as I understand it, but that is my  
20 interpretation of what you are seeking rather than your  
21 own. I would say what this is doing is that the trust  
22 experienced an economic shortfall and is unable to  
23 fulfill its obligations, and that the trust encountered  
24 these difficulties for a variety of complex reasons

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1 including its structure, how it paid claims, what it  
2 paid, how many it paid, the basis upon which it paid  
3 them, all sorts of things.

4 And it made choices and elects certain  
5 options and not other options, and what it is now  
6 seeking to do is recover a shortfall from the tobacco  
7 companies. That's what I would say it is trying to do  
8 now.

9 Q. Would you agree with the statement that this  
10 lawsuit is an effort by the trust to pursue additional  
11 assets?

12 MR. MUNSON: Objection. Asked and answered.

13 A. I have answered that question as best I am  
14 able.

15 Q. I believe you testified before that you have  
16 at least met Professor Schuck; is that right?

17 A. Yes, I have.

18 Q. You understand that Professor Schuck has been  
19 designated as an expert witness in this lawsuit?

20 A. I came to know that only after I had written  
21 both my reports, when I was sent a copy of a report  
22 that he did, and it was only at that time that I became  
23 aware that he was, had written a report.

24 I don't know that he has been, I don't know

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1 the formal terminology as to whether he has or hasn't  
2 been designated.

3 Q. Have you reviewed the report that Professor  
4 Schuck prepared?

5 A. Subsequent to writing both of my reports I  
6 have read his report and his supplemental report.

7 Q. Do you know whether or not Professor Schuck  
8 has been deposed in this case?

9 A. It is my understanding that he has been  
10 deposed.

11 Q. Have you reviewed the transcript of that  
12 deposition?

13 A. No. I have not.

14 Q. Are you aware that during his deposition  
15 Professor Schuck agreed with the statement that in 1988  
16 it could be documented that the tobacco industry had  
17 for decades intentionally deceived the government and  
18 the public by withholding, suppressing and distorting  
19 research on the dangers of smoking and the synergistic  
20 effects of smoking and asbestos exposure?

21 A. I have no knowledge as to anything that  
22 Professor Schuck said in his deposition.

23 Q. Are you aware that during his deposition  
24 Professor Schuck testified that it could be documented

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1 in 1988 that the tobacco industry had developed but  
2 then suppressed and refused to market a safer  
3 cigarette?

4 MR. MUNSON: Objection to the question on the  
5 grounds that she has already testified that she  
6 had no knowledge about the Schuck deposition.

7 You are just reading another quote to her.

8 A. I had no idea what he said at his deposition.

9 Q. Professor, if it is true that it could be  
10 documented in 1988 that the tobacco industry had for  
11 decades intentionally deceived the government and the  
12 public, who in your view as between the tobacco  
13 industry and the trust claimants should bear the burden  
14 of the trust's current financial difficulties?

15 MR. MUNSON: Objection to the question on  
16 the grounds that it is unclear what the word  
17 documented means, and it makes a number of  
18 assumptions of facts that are not in evidence.

19 A. If you want to clarify the question for me  
20 and be more specific, I can try to answer.

21 Q. Can you read the question back.

22 (Record read.)

23 A. I think this is mixing two completely  
24 separate issues together here.

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1 Whatever liability the tobacco industry does  
2 or doesn't have to people that is a separate question.

3 And that is one that I leave to others to  
4 assess and resolve. The question that I have been  
5 looking at is how did this trust, which grew up in this  
6 bankruptcy out of this bankruptcy, how did it pay the  
7 people that it was obligated to pay pursuant to the  
8 terms of the plan of reorganization.

9 And at the end of the day when there was such  
10 a shortfall what steps along the way contributed to the

11 trust being in that posture. That's what I looked at  
12 and that for me is the question, and I have assessed  
13 the trust responsibilities and the influences that  
14 played on the trust for what happened to it. That's  
15 what I have done and that's my answer.

16 Q. Professor, I appreciate that the question I  
17 asked you is one that you would like, and I am using  
18 your words, to leave to others to resolve, but  
19 nonetheless I would like you to answer it.

20 A. I only want to leave part of it to others to  
21 resolve. I am happy to answer the part about, what do  
22 I think happened to this trust, how --

23 Q. Professor, I would like you to answer the  
24 question that I asked you.

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1 MR. MUNSON: Counsel, counsel, I object to  
2 you interrupting the witness.

3 If you ask a question and the witness is  
4 answering your question, she is entitled to finish  
5 answering the question.

6 MR. FINK: She is entitled to answer the  
7 question I asked.

8 MR. MUNSON: The fact that you do not like  
9 the answer does not give you the right to  
10 interrupt her answer.

11 You are free to ask her another question of  
12 any kind that you like.

13 MR. FINK: Okay.

14 A. What I was saying is, I answered half of,  
15 half of your question; the part that I can't answer,  
16 which is that I really looked at the trust, its  
17 lineage, its structure, its behavior, its organization  
18 and I understand why that trust got into the position  
19 it got into. That's what I can speak to, why it got  
20 into the position that it did.

21 I have not looked at nor am I looking at  
22 what the tobacco companies did or did not do in their  
23 business.

24 That is that subject, what the tobacco

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1 companies did or did not do is a separate question that  
2 I have neither looked at and that I do leave to others  
3 to answer.

4 MR. FINK: You are done. Let's go off the  
5 record, we have to switch videotapes.

6 THE VIDEOGRAPHER: We are now going off the  
7 record and the time is 12:29 p.m. and this is the  
8 end of the tape labeled number 5. This videotape  
9 deposition will continue on the tape labeled  
10 number 6.

11 (Recess).

12 THE VIDEOGRAPHER: On the record.

13 Stand by, please.

14 This is the tape labeled number 6 of the  
15 videotaped deposition of Professor Karen Gross.

16 We are now going on the record, the time is  
17 12:31 p.m.

18 Q. Professor Gross, I am going to try, again, I  
19 will try this again and I would like you to listen  
20 carefully to my question because I am not asking you  
21 to make any evaluation of the tobacco industry

22 misconduct.

23 And, so I will ask you to listen carefully to  
24 the question and then to answer it.

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1 The question is, if it is true that the  
2 tobacco industry has for decades intentionally deceived  
3 the government and the public then who as between the  
4 tobacco industry and the trust's beneficiaries should  
5 bear the burden of the trust's financial difficulties?

6 MR. MUNSON: Objection. Asked and answered.

7 A. I have nothing further to add other than that  
8 which I have already stated.

9 Q. So, am I correct in understanding that you  
10 had no answer to that question?

11 MR. MUNSON: Objection.

12 Argumentative -- the witness and counsel.

13 You asked a question and she gave a answer,  
14 and you asked again and she said she couldn't give  
15 anything further. And you are now improperly  
16 arguing and trying to provoke the witness.

17 MR. FINK: The question was never answered,  
18 counsel. That's okay.

19 I have nothing further for you at this time,  
20 Professor Gross.

21 MR. MUNSON: All right.

22 Let's go off the record.

23 THE VIDEOGRAPHER: We are now going off the  
24 record, the time is 12:33 p.m. and this is the end

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1 of the tape labeled number 6.

2 This concludes the videotaped deposition  
3 of --

4 MR. MUNSON: No, it doesn't conclude the  
5 videotaped deposition.

6 THE VIDEOGRAPHER: I am sorry.

7 MR. MUNSON: We are going off the record for  
8 a break.

9 THE VIDEOGRAPHER: We are now off the record,  
10 the time is 12:33 p.m.

11 (Recess.)

12 THE VIDEOGRAPHER: Stand by. We are now  
13 going on the record, the time is 103 p.m.

14 BY MR. MUNSON:

15 Q. Professor Gross, I have got just a couple of  
16 quick questions that I wanted to ask you following up  
17 on some of your earlier testimony.

18 You testified at some length about your  
19 experience and training and education and work that you  
20 have done and what I would like to do is to ask you to  
21 tell us what is the expertise that you have that in  
22 your view is pertinent to the work that you have done  
23 in this case? Can you do that?

24 A. Yes. All right.

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1 Um, I spent the last 20 years thinking about,  
2 writing about, speaking about and analyzing the  
3 bankruptcy system. And I have done that in a variety  
4 of ways, and if I can turn to the resume that may make  
5 that even clearer. In the most general terms I have  
6 done it by --

7 Q. You are looking at now what exhibit?

8 A. I am looking at appendix A to the  
9 supplemental report.

10 Q. Okay.

11 A. I have done it through my role as an  
12 academic, which includes reading the academic  
13 literature, remaining current on everything that  
14 happens in my field, and I have done it through my  
15 practice, experience both before I entered academia and  
16 subsequent there to.

17 I have done it by participating in a variety  
18 of bar association activities and through a variety of  
19 speeches that I have given.

20 But, if one focuses even more thoroughly,  
21 what have I done that relates to Chapter 11, which is  
22 what we are talking about here, let me point to some  
23 specific things that relate to Chapter 11.

24 And since there is no specific subchapter of

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1 the bankruptcy law related to mass tort bankruptcies,  
2 let me talk about Chapter 11 generally since what  
3 applies to Chapter 11 applies to mass tort cases.

4 So let me start with my book. My book  
5 addresses Chapter 11 in significant detail, in terms of  
6 other articles that I have written that specifically  
7 address Chapter 11.

8 I wrote a piece with someone who was then  
9 my law student and now is a practicing lawyer on  
10 bankruptcy solutions in the United States, an  
11 overview. And that is a piece on Chapter 11 in the  
12 context of a conference that looked at Chapter 11 in  
13 the United States as a touchstone for thinking about  
14 corporate reorganization in emerging nations.

15 Q. Is this listed in your resume?

16 A. Yes.

17 Q. Where is it?

18 A. The sixth article down in the list of  
19 articles on page 2.

20 Q. So the title of it is what?

21 A. Bankruptcy Solutions in the United States: an  
22 Overview.

23 MR. FINK: Is there a pending question?

24 MR. MUNSON: Yes.

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1 MR. FINK: I think the last question was,  
2 which is -- or something like that.

3 Q. Go ahead, Professor.

4 A. The article that appears two down on that  
5 list, in Defense of Debtor Exclusivity assessing four  
6 of the 1994 amendments to the bankruptcy code, is  
7 dealing with changes to the bankruptcy law that affect  
8 Chapter 11 and how to think about Chapter 11 and what  
9 would make it work well and what makes it not work  
10 so well.

11 Q. Any other articles on Chapter 11?

12 A. Yes. I will give you two more right here.

13 On the next page of the resume there is one  
14 called Debtors Out of Control, a look at Chapter 11's  
15 check and balance system, which is looking at how  
16 Chapter 11 functions and how the various constituencies  
17 in the Chapter 11 work or don't work well with each

18 other.

19 And lastly, I refer you to the piece called  
20 an Overview of the Bankruptcy Reform Act of 1978, which  
21 discusses the difference between Chapter 11 now under  
22 the current law versus the old law.

23 So, those articles demonstrate my experience  
24 in, my knowledge of and understanding of Chapter 11,

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1 and then there have been some other writings I wrote on  
2 expert panels in Chapter 11 and the need for expert  
3 panels, which addresses how to think about the costs  
4 and functioning of Chapter 11 and what would make it  
5 work better. And then I also --

6 Q. Is that an article that you are specifically  
7 referring to?

8 A. It is a very short article, it appears on,  
9 in my resume under other publications, because it is  
10 shorter in length than some of the others.

11 Q. Where's that on your resume?

12 A. It shows up on page 4, and it is slightly  
13 past the middle of the page.

14 Q. What's the name?

15 A. It is Expert Panels: A recommendation to the  
16 National Bankruptcy Review Commission.

17 And lastly while on that page 2 down from  
18 that, is a bibliography that I did on bankruptcy  
19 ethics, which relates to a number of articles involving  
20 ethical issues that arise in Chapter 11 cases, and this  
21 is a detailed bibliography of those articles, which has  
22 actually been reprinted and cited by professionals for  
23 containing the majority as of this date of articles of  
24 the ethical issues in Chapter 11.

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1 Q. What's the title of that article?

2 A. That article is entitled Selected  
3 Bibliography on Ethics for Bankruptcy Professionals:  
4 attorneys, judges, trustees and committees.

5 Q. Any other publications on Chapter 11?

6 A. There may be others that touch on it, but I  
7 would say this is the a fair representation of those on  
8 the list. There are certainly others I have written on  
9 single asset Chapter 11 cases, there are certainly  
10 others that touch on it, but these are a representative  
11 and significant sample of that which I have done.

12 Q. You were asked some questions earlier in this  
13 deposition about mass torts and asbestos. And what I  
14 would like you to do is to tell us what the basis is  
15 for your knowledge about mass torts and asbestos,  
16 separately. Do mass torts first.

17 A. Um, well, let me begin my saying, by saying  
18 that my knowledge of mass torts is informed by my  
19 knowledge of Chapter 11, because if you understand  
20 Chapter 11 you will be able to address the issues in a  
21 mass tort case; while mass tort cases are bound by the  
22 same provisions that govern all Chapter 11 cases.

23 So, everything that I just gave you plus  
24 various bar association committees on which I have

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1 served, including a joint business law and litigation  
2 task force on bankruptcy structure and the insolvency

3 process all go to that. But turning very specifically  
4 to mass tort issues, let me discuss first what I have  
5 done in terms of my teaching.

6 In my teaching I have taught mass tort issues  
7 in both my basic bankruptcy course and in my more  
8 advanced course, indeed in my advanced course I have  
9 used in the past a book, one-third of which is  
10 dedicated to the Johns-Manville case.

11 Q. What's the title of the book?

12 A. It is called Strategic Bankruptcy, and it is  
13 by someone named Kevin Delaney.

14 Q. It is a textbook?

15 A. No. Actually it is not a textbook, he is an  
16 academic, but it is a book about corporate bankruptcy  
17 which we read in the course in which he analyzed and  
18 assessed his understanding of three major mega Chapter  
19 11 cases. And I have used that book as a way of  
20 discussing Chapter 11 and in particular mass tort  
21 cases.

22 I also have taught the cases in the case  
23 book, which relate to mass torts, and I would say many  
24 of those case books have included the, one of the

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1 Johns-Manville decisions within the case book itself.

2 In addition to that, I have also been the  
3 moderator of programs at which mass tort issues have  
4 been discussed, and I can specifically show you where  
5 some of those appear, and these are programs in which  
6 the topic of mass torts has been raised. So, let me  
7 give you some.

8 I have participated for several years in  
9 a program by the Southern Florida Bankruptcy Bar  
10 Association, which is a retreat. And at that retreat  
11 there are a number of problems that are presented to  
12 participants that are discussed. And I did that  
13 program in 1995, and I did that program in 1991 and  
14 1992.

15 Q. Are these listed on your resume somewhere?

16 A. Yes.

17 Q. Where are they?

18 A. They appear at various pages in the  
19 presentation that I have given. I can show you them  
20 specifically.

21 For example on page 10, the fourth down is  
22 one such group, one such program where I was a group  
23 leader at which mass tort topics were addressed.

24 That program is one that I did the year

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1 before and that shows up at page 11, two down, on the  
2 list.

3 I also did the program in 1991 and 1992 and  
4 that shows up at page 12. And then there are programs  
5 that I did which are somewhat similar in nature in  
6 terms of being a group leader for programs that discuss  
7 a variety of relevant bankruptcy issues, and another  
8 such one is the Eastern District of Pennsylvania  
9 Bankruptcy Conference, and while I gave a specific  
10 presentation on mediation and bankruptcy, I also led  
11 group discussions. And if my memory serves, mass torts  
12 would have been included over the years in those  
13 conferences; and those were in 1992 and 1993.

14 Q. Anything else that you can point to that  
15 is the basis for your knowledge about mass torts  
16 beyond the teaching that you have discussed and the  
17 presentation that you have listed just now?

18 A. Well, I would also add before I get to one  
19 final piece which is the material in my book on that, I  
20 have done as an academic reading on this topic, part of  
21 my job as an academic is to read, think about and  
22 analyze the bankruptcy system so that I am familiar  
23 with the literature that addresses mass torts issues.

24 I participate regularly in dialogues

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1 with academics and practitioners about the world of  
2 bankruptcy, which has included the topic of mass torts.

3 Q. What sort of things have you read?

4 A. I have read law review articles, I have read  
5 newspaper articles, which discuss mass tort issues.

6 Indeed, one of the articles that exists in  
7 the academic literature on mass torts is one where I  
8 served as the reviewer of that article for the person  
9 who wrote it in the sense that I was delivered a draft  
10 and read and critiqued that article.

11 Q. Which article was that?

12 A. It is an article on mass torts written by a  
13 Professor Kathryn Heidt.

14 Q. Where was that published?

15 A. That piece was published I think in the  
16 American Bankruptcy Law Journal.

17 Q. Is that a scholarly journal?

18 A. Yes. That is a scholarly journal dedicated  
19 to the bankruptcy field.

20 I might add that I also serve on the advisory  
21 boards of various publications. And in that context  
22 for the American Bankruptcy Institute Law Review,  
23 sitting on their advisory board we talk about what  
articles should be published and how to think about

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1 what should go in an academic bankruptcy law journal.

2 And so I am familiar with the literature and  
3 the topics that people are talking about and thinking  
4 about, and have helped developed what should be in that  
5 journal.

6 And there are other by the way similar  
7 academic journals dedicated to bankruptcy that I have  
8 read and regularly read as a part of what I do.

9 Q. You also mentioned that, earlier, that you  
10 wanted to address some issues in your book.

11 A. Yes, I would.

12 Q. Your book again is entitled what?

13 A. My book is entitled Failure and Forgiveness  
14 Rebalancing the Bankruptcy System.

15 I wanted to indicate that at a certain point  
16 I had been asked if the only place in my book that I  
17 mentioned mass torts was in certain number of I think  
18 5 pages that specifically were referenced, and I  
19 indicated in answering that there were lots of places  
20 in my book where that topic was discussed, indeed the  
21 concept of mass torts permeates the book.

22 And I thought it might be useful to identify  
23 specifically for you some of those spots where that  
24 occurs.

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1 Q. Please do, if you would.

2 A. Um, well just as a few examples, references  
3 to mass tort cases appear on page 31 of the book, where  
4 I talk about that many well known companies have  
5 partaken of Chapter 11s, benefits and specifically  
6 mention in that context Dow Corning, which was a mass  
7 tort case.

8 Turning to another example on page 80 in the  
9 book, where in the book I am discussing what's  
10 happening in the bankruptcy system. I say in cases  
11 involving mass torts such as those of the A.H. Robins,  
12 the Dalkon Shield, Johns-Manville asbestosis and Dow  
13 Corning silicone implants, the number of existing and  
14 future claimants could reach the tens of thousands.

15 And then I go on to say in the book, in the  
16 Johns-Manville case it was estimated that there were  
17 more than 110,000 possible future claimants.

18 And I go on to explain that mega Chapter 11  
19 cases of which mass torts are won are only a small, are  
20 one, are only a small percentage of all filings and  
21 that in chapter 11 is a small percentage of all filings  
22 and mega mass tort cases are even a smaller  
23 percentage.

24 An additional example appears on page 87

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1 where I discuss where the mega cases have gravitated,  
2 which is the Southern District of New York, which is  
3 where the Johns-Manville case took place.

4 Another such example appears and then  
5 continues actually for several pages closely related,  
6 pages 168, 169, 170, 171, and let me just read you a  
7 part of those because I make a distinction between  
8 what's known as voluntary and involuntary creditors.

9 And involuntary creditors are tort claimants  
10 whereas voluntary creditors are those who choose to  
11 lend money to a debtor. And then I talk about the  
12 difference between tort victims and that some tort  
13 victims are different from others, and that mass tort  
14 victims are one sub category of tort victim and that is  
15 dealt with at some length at page 170 to 171 of the  
16 book.

17 And let me just read you, because what it  
18 alerts you to is that, the depth of which I have  
19 thought about these issues, if that is all right.

20 It says, and I am quoting from the book: But  
21 not all tort victims are the same either. Some torts  
22 result in monetary rather than physical injury.

23 Business interference and slander for example are torts  
24 that do produce injury including monetary and psychic

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1 harm, but not necessarily bodily injury.

2 Also individual tort victims are different  
3 from the victims of mass torts and not all mass tort  
4 victims are equally situated.

5 And then I go on to explain that in the  
6 previous example the tort creditor was not injured as  
7 a result of a mass tort, and then I talk about in  
8 contrast mass torts raise a serious issue of how to  
9 address the potential and commonly unanticipated harms

10 that are a by-product of industrialization and  
11 advancing medical knowledge, as more and different  
12 products are developed. And as researchers learn more  
13 about the long term effects between environment  
14 chemicals, and health seemingly safe products become  
15 the weapons of death.

16 Then I go on.

17 I will tell you that throughout my book, as  
18 I indicated before but in very specific ways as well,  
19 the issues that are relevant here are ones that I have  
20 thought about, written about, spoken about in the  
21 context of over 20 years of thinking about the  
22 bankruptcy system.

23 Q. Professor, what about specifically, your  
24 knowledge about asbestos related issues as a separate  
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1 matter, as a basis of your knowledge of asbestos  
2 related issues?

3 A. Um, well, as to asbestos issues, first of  
4 all, there is no separate chapter for mass torts, there  
5 is no separate chapter for asbestos cases either.

6 Q. Professor, I am not, excuse me for  
7 interrupting, I am not asking you now about your book.

8 My question is broader than your book.

9 My question is, what's the basis for your  
10 knowledge of about asbestos related issues, broadly,  
11 not --

12 MR. FINK: I don't mean to interrupt you.

13 I was cautioned on the record many times for  
14 interrupting the witness, and I believe you have  
15 now done that on a number of occasions.

16 Q. Do you understand my question?

17 A. Yes. I do.

18 Q. Okay.

19 A. Not only am I familiar with bankruptcy  
20 generally speaking, having spent 20 years thinking  
21 about it, but I have also thought about Chapter 11 and  
22 asbestos cases are part of Chapter 11 cases; there is  
23 no special chapter for asbestos cases.

24 But then I have also thought quite

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1 particularly about mass tort cases, as I have  
2 indicated. And then even more particularly as to  
3 asbestos cases, I have actually taught about the  
4 Johns-Manville case in particular.

5 Indeed, the book that I referenced earlier  
6 Strategic Bankruptcy, one-third of it is dedicated to  
7 Johns-Manville.

8 So I have actually taught students about  
9 that case, and indeed in the case books that I use  
10 Johns-Manville has been mentioned, and indeed on  
11 several occasions actual opinions from the case have  
12 been there.

13 I have actually taught the case itself to my  
14 law students. So, in that context and in writing my  
15 book I have not only read about and thought about and  
16 specifically mentioned asbestos cases, but I have  
17 actually taught them to law students.

18 Q. In your earlier testimony there were some  
19 questions about your, the invited presentation section  
20 of your resume, page 7.

21                   And you talked about some of these  
22 presentations concerning I think as you put it, an  
23 intersection between mass tort and Chapter 11; do you  
24 recall that?

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1                   A. Yes.

2                   Q. Can you, are there any of these presentations  
3 as you look at these that you recall relate to that  
4 issue that is the intersection of mass tort and Chapter  
5 11?

6                   A. Well, there are several presentations that  
7 I did that address mass torts in Chapter 11, those  
8 include the ones that I mentioned in the context of the  
9 Southern Florida Bankruptcy Bar Association retreat.

10                  That set of programs involves problems and  
11 some of those problems grow out of mass tort issues.

12                  In the context of those workshops I would be  
13 addressing mass tort issues and Chapter 11 together  
14 surrounding a problem that was being presented to the  
15 group.

16                  And would both participate in, hear, and  
17 resolve issues involving mass tort and Chapter 11 with  
18 the bankruptcy practitioners who were there at those  
19 sessions.

20                  Q. Other than the Southern Florida Bankruptcy  
21 Bar Association meetings, are there any others of these  
22 presentations where the intersection of Chapter 11 and  
23 mass tort was at issue?

24                  A. It was likely at issue in the programs that I  
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1 did at the Eastern District of Pennsylvania bankruptcy  
2 conference, which were also problem based programs  
3 where you resolve a problem and mass tort issues would  
4 have arisen there.

5                  And let me suggest one other as an exemplar  
6 program where this would have come up, which is in the  
7 context of discussing releases in Chapter 11 plans  
8 which is a question of who ultimately is relieved of  
9 potential liability, and I did a program on that topic  
10 for the American Bar Associations Chapter 11 meeting,  
11 which is their specific subsection dealing with Chapter  
12 11, in October of 1995, and that issue, the issue of  
13 releases in Chapter 11 plans is one that comes up in  
14 mass tort cases as well as in other kinds of Chapter 11  
15 cases. So, that would be an example of where the  
16 issues would intersect.

17                  Q. Are there any others that you can think of  
18 and if not, that's fine.

19                  A. Ah, I think those are the ones that most  
20 specifically come to mind.

21                  Q. On a different topic, on your resume on page  
22 2 you list the publication under books, Lady Lucy's  
23 Quest, the unpublished fairy tale. And you were asked  
24 some questions about this earlier in your deposition.

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1                  Do you remember those questions?

2                  A. Yes. I do.

3                  Q. I have just a couple questions. Does this  
4 fairy tale make any explicit reference to Chapter 11 or  
5 fairness and integrity related issues?

6 A. No. Lady Lucy's Quest does not explicitly  
7 reference Chapter 11.

8 Q. Do any of your other publications make  
9 explicit references to Chapter 11 and fairness and  
10 integrity related issues?

11 A. They most assuredly do.

12 I have written a number of articles that deal  
13 explicitly with Chapter 11 in addition to my book, and  
14 in the context of those articles like bankruptcy  
15 solutions in the United States an Overview, or in  
16 Defense of Debtor Exclusivity, or Taking Community into  
17 Account, those articles specifically reference Chapter  
18 11 and deal with issues of fairness and equity and  
19 integrity within the Chapter 11 process.

20 Q. In the work that you did on this case to  
21 date, have you made any study where you, were you asked  
22 to or did you make any study of whether anything the  
23 trust did here made claimants' sick?

24 A. No. I have not been asked to address that

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1 question, although I may have misunderstood an earlier  
2 question where I thought I was being asked about  
3 whether I thought that the trust caused people to get  
4 asbestosis. So, I may have misunderstood a question,  
5 but I was not asked whether the trust caused people to  
6 be sick.

7 Q. Do you have any basis then to say whether or  
8 not the trust had made people sick?

9 A. No. I don't have a basis to make that  
10 assessment.

11 Q. Do you have any knowledge about whether the  
12 trust made any warnings to asbestos workers at any  
13 point along the way?

14 A. I don't know.

15 Q. Can you -- you were asked some questions  
16 about the bankruptcy code and mass tort structure  
17 organization and operation, earlier.

18 My question is, can you point to any examples  
19 of the bankruptcy code and provisions of the code that  
20 relate to or concern mass tort trust structure  
21 organization or operation.

22 MR. FINK: Objection to the form of the  
23 question.

24 Q. Is that clear?

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1 A. Yes. I can answer.

2 I am aware of and will give you specific  
3 sections that relate to that because the sections that  
4 worked for Chapter 11 work for mass trust torts because  
5 a mass trust tort is like a half of a debtor.

6 In that sense let me give you some examples.

7 A trust has to deal with allowed claims,  
8 which is a bankruptcy code provision.

9 A trust is not supposed to pay anything other  
10 than people who are entitled to payment. A trust has  
11 to pay in accordance with the bankruptcy code provision  
12 about how creditors have to be treated fairly and  
13 equitably, that is part and parcel of the bankruptcy  
14 system and the means by which the trust has to  
15 operate.

16 So those are examples of how the trust is

17 not unconstrained, the trust is governed by specific  
18 provisions of the bankruptcy code as to what it can and  
19 can't do and how it can and can't do certain things.

20 Q. You testified earlier in this deposition on a  
21 section of the bankruptcy code, I believe Section 524  
22 G; do you recall that?

23 A. Yes.

24 Q. I think you testified that you had not

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1 specifically reviewed Section 524 G in connection with  
2 your work in this case. My question is, why not?

3 A. I did not review it specifically for purposes  
4 of this case because it is not relevant --

5 Q. Why not?

6 A. -- to this case.

7 Well, it is not relevant for several  
8 reasons. One is, I was asked to address how the trust  
9 got in the situation that it got in, and the issues  
10 raised by 524 G are not ones that informed that  
11 assessment that I made.

12 I looked at facts and interpreted and  
13 analyzed and thought about those facts and 524 G was  
14 not one of those facts that I looked at.

15 Moreover, 524 G, Section 524 G came into  
16 being in 1994. And the facts that I was looking at  
17 all, not all but many antedated 1994.

18 And so the introduction of the channelling  
19 injunction after the fact is not relevant to what I did  
20 and how I thought about all of this.

21 I am certainly aware of the section, it is  
22 not a section that is impacted by or relevant to that  
23 which I did here.

24 Q. Earlier today you testified, you were asked

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1 some questions about the number of claims that have  
2 been asserted against the trust; do you recall that  
3 testimony?

4 A. Yes.

5 Q. And my question is this, what if any  
6 relationship is there between the number of claims  
7 asserted against the trust and how those claims against  
8 the trust have been handled by the trust?

9 A. There is a very important relationship  
10 between the number of claims and how those claims are  
11 assessed. A number, you just can't look at the number  
12 of claims, freestanding, because it doesn't in and of  
13 itself answer the important, all the important  
14 questions.

15 You have to think about how did the number  
16 get big, and then once you have the size of the number,  
17 what did people do with the claims. How did they pick  
18 and choose which ones got paid, how accurately were  
19 they paid, what influenced the way claims were paid.

20 All of those factors, which inform really  
21 what you do with the number help explain why the number  
22 in and of itself is not enough to tell you what  
23 happened here.

24 So, there is a direct relationship between

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1 number and treatment and influence and impact, all of

2 which go to understanding what happened here.

3 Q. In your view is there anything that the  
4 trust did that, with respect to claims, that affected  
5 the number of claims that were brought against the  
6 trust?

7 MR. FINK: Objection to form.

8 A. I think there may have been from my reading  
9 of the materials several things that happened that may  
10 have caused the actual number of claims to have  
11 increased.

12 The standards pursuant to which claims were  
13 assessed, in other words how much proof there had to  
14 be and how carefully claims were assessed could have  
15 affected the number, increased the number of claims.

16 Another way that the trust behavior could  
17 have affected the number of claims is that unless  
18 certain claims were brought at certain times under the  
19 way the trust was structured it might not have been  
20 possible or people may not have thought that they would  
21 have gotten paid.

22 So, certain timing of claims and number of  
23 claims happened because of the way the trust behaved  
24 and what it did and how it was structured.

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1 So, it is my, my answer to your question that  
2 the trust's behavior not only could but did affect the  
3 number of claims based on everything that I have read.

4 Q. The trust's behavior increases or decreases  
5 the number of claims in your view?

6 A. Based on my reading of all of the materials  
7 that are referenced, the trust's behavior increased the  
8 number of claims that were brought.

9 Q. One last question.

10 You were, in your earlier testimony you were  
11 asked this question:

12 Professor, do you understand your opinion in  
13 this case to go to the question about whether or not I  
14 believe as you put it the trust is entitled to recover  
15 from the tobacco industry?

16 Answer: I think both my reports go to the  
17 ultimate issue, which resolves around who got paid, how  
18 much they got paid and why they got paid.

19 And then there is more that follows.

20 But I wanted to ask you, what you meant there  
21 when you used the two words "ultimate issue."

22 A. What I meant is that my two reports are  
23 relevant to, are inform -- inform how one resolves the  
24 issues in this case. In other words, I hope what I

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1 have done helps people to ultimately resolve the issues  
2 here.

3 MR. MUNSON: No further questions. Thank  
4 you, Professor.

5 THE WITNESS: Thank you.

6 BY MR. FINK:

7 Q. Professor Gross, you have had various  
8 breaks during the testimony that you have given in your  
9 deposition today and on Wednesday; is that right?

10 A. Yes, we have.

11 Q. Have you during any of those breaks or in the  
12 interim between the first session of your deposition

13 and this session had an opportunity to discuss with  
14 your counsel any of the questions that were just asked  
15 to you?

16 A. Um, the lawyers indicated that they wanted to  
17 ask me certain questions to clarify or elaborate on,  
18 elaborate on or illuminate certain issues, so I knew I  
19 was going to be asked questions.

20 Q. All right. I guess my question is whether  
21 you discussed with them the subjects of any of the  
22 questions that Mr. Munson just asked you?

23 A. I think I knew the general subject areas in  
24 which he told me he was going to ask questions.

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1 I formed my own answers as I always have and  
2 I am very clear about that. I answer in ways that  
3 I believe based on what I have done and that I am  
4 comfortable with. And that's how I have operated to  
5 date.

6 Q. What were the subjects that Mr. Munson  
7 identified for you as ones that he was going to cover?

8 A. Um, basically, the ones that he covered now.

9 My experience in, I would say my experience.

10 Um, and he indicated that -- I don't recall  
11 any other specific areas in which he said that he  
12 wanted to mention something.

13 Q. Professor Gross, are you aware of any  
14 scholars who you would identify as experts in issues  
15 unique to mass tort bankruptcies?

16 A. I am sorry. Can I --

17 Q. Would you read that back.

18 (Record read.)

19 A. I don't know anyone who has just written  
20 about mass torts. There have been some people who have  
21 written more about mass torts than other topics.

22 So, in that sense I am familiar with certain  
23 academics who have written more about mass torts than  
24 perhaps they have written about other things, if one;

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1 but bankruptcy professors tend to write about a variety  
2 of topics and bankruptcy professors teach a wide range  
3 of issues, which include mass torts, but certainly  
4 aren't limited to them.

5 So, I guess my answer to your question,  
6 that's my answer to your question.

7 Q. Can you identify for me any scholars who you  
8 would identify as experts in mass tort bankruptcy?

9 A. I would say there are a cadre of us who write  
10 about mass torts and bankruptcy and different phases of  
11 it and different aspects of it and different pieces of  
12 it. I don't know that I could name one person whom  
13 I would consider sort of the bankruptcy mass tort  
14 person. Different of us speak to different parts of  
15 it, so I don't think I could name you one bankruptcy  
16 law professor that would be uniquely defined by his or  
17 her writings in that area.

18 Q. Professor, please listen carefully to my  
19 questions. I am not asking you to identify the mass  
20 tort expert, I am asking you if you can give me some  
21 examples of scholars who you would identify as experts  
22 in mass tort bankruptcy?

23 A. Um, we are getting to this issue of you know

24 is a bankruptcy scholar someone who is --

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1 Let me answer it again.

2 There are lots of people who have expertise  
3 in mass torts and bankruptcy, and if you looked at  
4 their writings they have written things that involved  
5 mass torts and bankruptcy.

6 I am not sure whether they would define  
7 themselves or I would define them as experts in mass  
8 torts and bankruptcy. I can certainly tell you people  
9 who have in addition to myself who have written on mass  
10 torts and bankruptcy. But --

11 Q. Are there individuals who you consider more  
12 expert than yourself in mass tort bankruptcy?

13 A. I think there might be people who, whose  
14 writing one could say is more directed at mass torts,  
15 and depending on ones different definition of mass  
16 tort, expert might fit that.

17 There was a period of time where lots of  
18 people were writing, it surrounded a certain time  
19 period, the meaning of future claims, the meaning of  
20 the word claim, those kinds of issues, and there were  
21 people who wrote very focused articles on that.

22 So, depending on how you define mass tort  
23 expert, I would tell you that of the books that have  
24 been written about how to think about bankruptcy, about

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1 how the system works, how to treat voluntary versus  
2 involuntary creditors, how to think about how  
3 committees and Chapter 11 functions, how to think about  
4 the policies behind the bankruptcy law, I would say  
5 that my book stands on a shelf with very few others in  
6 doing that.

7 Q. So, is it fair to say, Professor, that you  
8 are a leading expert in mass tort bankruptcy?

9 A. Um, I leave it for others to categorize who I  
10 am, and how they care to label me.

11 I can tell you how I consider myself, I  
12 consider and how I would define myself.

13 I would tell you that I am a person who  
14 has expertise in bankruptcy including Chapter 11,  
15 including mass tort cases, and that I am recognized as  
16 a preeminent scholar in my field as evidenced by my  
17 writings, my speaking engagements, my public  
18 recognition and the awards that I have gotten in the  
19 context of my profession. That's how I define myself.

20 Q. Professor, in your advanced bankruptcy course  
21 do you use a case book?

22 A. Um, no. I have in neither my Chapter 11  
23 course nor in my advanced policy courses, advanced  
24 bankruptcy policy I have not, I have used books, I have

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1 not used what one would define as a, in those courses a  
2 traditional case book.

3 Q. Which is the course in which you used the  
4 book Strategic Bankruptcy?

5 A. Um, I use that course in both a Chapter 11  
6 course and I have used it in my bankruptcy policy  
7 courses, which have taken a variety of forms,  
8 bankruptcy policy as a freestanding course, is a

9 freestanding course.

10 I have also taught it as a course coupled  
11 with an externship. In that context, I have used that  
12 book among I might add others. It is not the only  
13 material but, I have used it in that --

14 Q. What I was about to ask you in your Chapter  
15 11 course, how many books do you use in teaching that  
16 course?

17 A. Well, at the time I taught the Chapter 11  
18 course I may have used two books in addition to a  
19 variety of, and not counting the bankruptcy code itself  
20 or the bankruptcy rules, which count as books, I  
21 probably used two published books, if my memory serves,  
22 that would be about right, plus a variety of duplicated  
23 material which are handed out to students, sometimes in  
24 what looks -- as thick as books -- but as supplements.

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1 Q. Did I understand you correctly that  
2 approximately one-third of this book Strategic  
3 Bankruptcy addresses the Johns-Manville bankruptcy?

4 A. Yes. That is correct.

5 Q. What percentage of class time in your Chapter  
6 11 course would you say that you dedicated to the  
7 discussion of the Johns-Manville bankruptcy?

8 A. If you take the courses that, in which I  
9 discuss it, it has varied from semester to semester in  
10 terms of what are particularly hot or relevant issues  
11 at any given point in time.

12 As I indicated earlier, Chapter 11 is, mass  
13 torts is just one piece of Chapter 11. But, the  
14 Johns-Manville case usually would come up or mass tort  
15 cases in several contexts, eligibility to file, the  
16 nature of the automatic stay and relief from the stay  
17 and third party releases and the effects of third  
18 parties, as well as in the context of confirmation and  
19 beyond, and the strategic uses of bankruptcy, as the  
20 title of the book suggests. If I were giving you a  
21 percentage of what part of the course, 15 or 20  
22 percent.

23 Q. How much of that 15 or 20 percent was spent  
24 discussing the trust?

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1 A. The specific trust is that what you are  
2 asking?

3 Q. Yes.

4 A. The Johns-Manville trust or trust as a  
5 concept?

6 Q. The Johns-Manville trust.

7 A. Um, I would not say, um, a great deal of  
8 time was spent discussing the specifics of the  
9 Johns-Manville trust.

10 One of the things that you do when you teach  
11 is that the approach to material the way one addresses  
12 the issues are such that any given topic you could  
13 teach a whole course on, and you figure out really how  
14 you can give over the span of a semester students a  
15 very fair understanding, recognizing that you can't  
16 cover every issue.

17 What I will tell you though is that as an  
18 academic my job in preparing for class is always to  
19 think very broadly and to consider and read lots of

20 material, even if all of that doesn't ultimately get,  
21 it adorns what I teach, but students don't always hear,  
22 read, see everything that I have thought about  
23 beforehand. So, that's my answer.

24 Q. I have just asked you a series of questions

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1 about your Chapter 11 course. If I asked you the same  
2 questions about your bankruptcy policy course, would  
3 the answers be roughly the same?

4 A. I have been talking about both of them  
5 collectively.

6 Q. Fair enough.

7 A. I am sorry. I hadn't realized that you had  
8 made --

9 Q. That's fine. I want an answer as to both,  
10 and if you have already given it to me, the record is  
11 now clear.

12 A. I have been talking about my advanced  
13 bankruptcy courses, whether they have taken the course  
14 of Chapter 11 or an advanced bankruptcy policy -- I  
15 would say that the answers, the percentages may be  
16 slightly different, but on balance I would say that is  
17 a fair assessment.

18 Q. Thank you for that clarification.

19 At these programs with the Southern Florida  
20 Bankruptcy Bar Association and the Eastern District of  
21 Pennsylvania bankruptcy conference, did you select the  
22 problems to be discussed?

23 A. Um, actually at some of them I was asked if  
24 I could come up with topics that I thought should be

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1 discussed or to review problems that people had  
2 developed. For the most part though the problems were  
3 picked by the people organizing the conference because  
4 they thought that they were relevant or important or  
5 useful to practitioners.

6 Q. Did you ever bring to one of these programs  
7 a problem about mass torts, or were those all problems  
8 that were picked by the people involved in the  
9 conferences?

10 A. Well, I knew they would be picking mass torts  
11 because in Florida it was a particularly hot issue, so,  
12 while as I indicated to you I suggested topics, I knew  
13 in Florida I did not have to do that, that was one they  
14 would come up with on their own.

15 Q. Right. My question is, did you ever suggest  
16 a mass tort issue as a topic for one of these things?

17 A. I don't recollect --

18 I may have commented on a mass tort problem,  
19 I may have suggested some nuance or some suggestion or  
20 some case to add to the problem; I don't recollect.

21 Q. You said as I understand it that you  
22 eventually peer, that you essentially peer reviewed an  
23 article on mass torts by somebody named Kathryn Heidt;  
24 is that right?

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1 A. Yes, I -- peer reviewed is a more formal term  
2 suggesting that I was looking at it to accept it or  
3 reject it as a, for a journal. I was sent a draft and  
4 I read it and made some suggestions.

5 Q. What was the topic of that article?

6 A. It is an article on how to deal with mass  
7 torts in bankruptcy and how to think about mass torts  
8 and bankruptcy.

9 Q. How many people reviewed that article; do you  
10 know?

11 A. Um, I can only tell you who she acknowledges  
12 in the entry note to that article. I think it is me  
13 and one other academic, but she could well have shown  
14 it to others. It is, she just acknowledges two of us.

15 Q. Do you review articles written by other  
16 scholars before they are published, on a regular basis?

17 A. Um, yes. I read lots of articles,  
18 drafts of articles for people and when asked to comment  
19 or critique, whatever I am asked to do.

20 Q. Have you been asked to review drafts by, any  
21 other articles on mass torts?

22 A. None that I remember off the top of my head.

23 But I have to say that I read lots of  
24 articles for people, in a variety of contexts, short

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1 articles, long articles, and I wouldn't know one way or  
2 the other whether others of them have specifically  
3 dealt with mass torts.

4 Q. Is it your view that there is any specific  
5 bankruptcy code provision that was violated by the  
6 trust's payment of 100 percent to some claimants and  
7 less than 100 percent to some other claimants?

8 A. Just repeat it again, since we are --

9 Q. Sure. Can you read that back.

10 (Record read.)

11 A. I would say that the trust's behavior  
12 brings into question several bankruptcy code  
13 provisions. As I have indicated before there were  
14 questions about whether or not consummation even should  
15 have happened, and the fact that certain things were  
16 not disclosed prior to consummation raises as I think I  
17 answered previously certain issues about the need and  
18 requirement for disclosure in bankruptcy and the need  
19 and requirement to file accurate documents with the  
20 court.

21 And there are specific bankruptcy code  
22 provisions saying that you have to treat all like  
23 creditors equally, and those are implicated by the  
24 disparate treatment that you just described. And the

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1 other piece that is very useful to remember here also  
2 is that the code defines who can get paid and only  
3 allowed claimants should be paid.

4 And to the extent that people who weren't  
5 allowed claimants, which means by the way, just so I am  
6 clear about this, the trust was only supposed to pay  
7 people who had claims based on asbestos, and so if they  
8 did not pay those, if they somehow did not pay allowed  
9 claims then another aspect of the bankruptcy code is  
10 implicated.

11 So, I would say the answer to your  
12 question is yes, specific bankruptcy code sections are  
13 implicated by paying one group of people 100 percent  
14 and the other group of people only 10 percent.

15 Q. Professor, my question is not whether

16 bankruptcy code provisions are implicated.

17 My question to you is, can you identify for  
18 me any specific, and numbers would be great, bankruptcy  
19 code provisions that in your view were violated by the  
20 trust's payment of 100 percent to some claimants and  
21 less than 100 percent to other claimants?

22 MR. MUNSON: Objection. Asked and answered.

23 A. I am going to stand on the answer that I gave  
24 you. I think I explained -- explained what I thought

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1 happened.

2 Q. Okay. Professor --  
3 What's the basis for --

4 A. May I just finish?

5 MR. MUNSON: Go ahead.

6 Q. No, I think you said that she had. There is  
7 not a question pending at this point.

8 A. Right. I just wanted to know that I thought  
9 I had answered your question.

10 Q. I did not, but that is okay.

11 Professor, what's the basis for the statement  
12 that you made in your answer, I think it was two  
13 answers previous -- actually --

14 Strike that.

15 Professor, Mr. Munson asked you some  
16 questions about whether in your view the trust's  
17 conduct led to an increase in the number of claims  
18 against the trust; do you recall that?

19 A. Yes.

20 Q. Professor, do you claim to have any expertise  
21 in the area of propensity to claim?

22 A. In the area of?

23 Q. Propensity to claim.

24 A. Well, I have dealt with a lot of cases with

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1 very complex claims in bankruptcy, and I served as a  
2 court appointed expert -- not a court appointed expert,  
3 excuse me -- a court appointed official representative  
4 to speak for numerous parties who had interests that  
5 weren't otherwise represented.

6 And I have been involved in cases in which  
7 huge numbers of claims have been at issue. And as a  
8 bankruptcy person I have thought long and hard about  
9 claims. I am not sure I would define myself as  
10 somebody who had, was an expert on propensity in  
11 claims. I am not sure what that expert would be.

12 I can tell you that I have had expertise as  
13 to that experience as to that issue in the bankruptcy  
14 context. I am not sure I -- I don't know what the  
15 person would be, but I would not, I don't know what  
16 that person would be. But that is my experience in  
17 respect to claims.

18 Q. Do you have any empirical basis for your  
19 claim that more people have claimed against the trust  
20 as a result of the trust's conduct?

21 A. What I can tell you is that I saw documents  
22 relating to how the trust was operating and concerns  
23 about what it was doing, and concerns as to what was  
24 happening with the level of claims.

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1           And I am also familiar with documents  
2 relating to claims growth, and when it grew and how it  
3 grew. And from that information I was able to garner  
4 the insights that I have given you.

5           Whether or not that in your judgment  
6 qualifies as empirical, I don't know, it is based on  
7 the material that I have, the -- relied on that is set  
8 forth in these documents.

9           And I am sure one could find someone who  
10 is expert at quantifying what I am describing and my  
11 interpretation of the facts there, there no doubt could  
12 be someone who could do that.

13          Q. Professor, there is a chapter in your book  
14 Failure and Forgiveness called Impericalism in  
15 Bankruptcy; isn't there?

16          A. Can I get my book?

17          Q. If you need to, sure.

18          A. Yes there is a chapter entitled Impericalism  
19 in Bankruptcy.

20          Q. You know what empericalism is; do you not?

21          A. Um, there are different kinds of  
22 empericalism, but yes I have a sense, absolutely, as to  
23 what empericalism means.

24          Q. Okay. Professor, have you made any effort to  
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1 quantify the extent to which if at all the trust's  
2 conduct has led to an increased number of claims  
3 against the trust?

4          A. I have examined and interpreted and thought  
5 about the materials to indicate that it happened.

6          I have not quantified the specific amount of  
7 claims that were so affected. I have not done that  
8 quantitative analysis. And indeed the person who would  
9 do that would have expertise in quantification, which  
10 is not something that I was asked to do nor is it  
11 something within the qualifications that I have.

12          Q. So, do you know as a fact whether or not more  
13 people actually claimed against the trust as a result  
14 of its conduct?

15          A. I know what the trust people said themselves,  
16 and I know they made observations about claims going up  
17 and I know that to the extent one can see cause and  
18 effect, there were certain facts that were written  
19 about and then there were certain things that happened  
20 in light of those facts.

21          And based on my interpretation and assessment  
22 I could give my view as to what I thought that meant.

23          And what I thought that meant was that claims  
24 were going up for the reasons that I described to you.

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1          Q. And your sole basis for that is your review  
2 of trust related documents; is that right?

3          A. It is the documents, many of the documents  
4 that are in the two lists that I have here, the vast  
5 majority of them would be trust related documents.

6          There may have been some aspects of this that  
7 were addressed in various other documents other than  
8 that I looked at, whether that be articles or court  
9 opinions or other things that I looked at, depositions  
10 that I read.

11          So, I would say it is based on the material

12 that I assessed and thought about.

13 Q. Professor, does your book Failure and  
14 Forgiveness have a can chapter called Conclusion and  
15 Recommendations?

16 A. Yes. It does.

17 Q. There is no reference in that chapter to mass  
18 torts is there?

19 A. Um, as you know, the book has a number of  
20 recommendations and I would --

21 Q. If you need to read them, feel free.

22 A. I would want to look them over to --

23 Q. That's my last question. If you want to take  
24 a break while you do that, that is fine.

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1 A. Um --

2 MR. MUNSON: Objection to the question.

3 What's in the book stands for itself.

4 MR. FINK: I would like an answer.

5 A. The answer to your question is, yes,  
6 there are some specific conclusions and recommendations  
7 that are directed at tort claimants and involuntary  
8 creditors.

9 Q. My question was about mass torts. Would you  
10 please go ahead and point them out to me.

11 A. Well, I think, I mean short of going over  
12 the whole conclusion with you, as I indicated when I  
13 referred to the book before, involuntary creditors  
14 would encompass mass tort claimants as would some tort  
15 claimants. So, there are aspects of the conclusions  
16 that no doubt would have an impact on mass tort cases.

17 Q. That's not my question.

18 I would like you to go through the  
19 conclusions and recommendations chapter and point out  
20 to me where there are references to mass torts or mass  
21 tort cases, and I would like you to read through it and  
22 point out the instances to me.

23 If you want to take a break while you look  
24 through it, that's fine with me, and if not, I will be

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1 happy to sit here.

2 MR. MUNSON: Objection. Asked and answered.

3 A. My book speaks for itself.

4 Q. Professor, am I correct in understanding that  
5 you are unable to point out to me any specific areas in  
6 the chapter on conclusion and recommendations in your  
7 book addressing mass torts?

8 A. No. I am --

9 Q. If not, then I would like you to please  
10 do so.

11 A. I am not unable to do it. I think what I  
12 have indicated is that the chapter, the conclusion and  
13 the recommendations which summarize the whole book  
14 which includes numerous references to mass tort would  
15 also deal with those issues, and what I have written  
16 speaks for itself.

17 Q. So, it is your testimony that this chapter  
18 summarizes the book? You just said that, didn't you?

19 A. The last chapter of the book is entitled  
20 conclusions and recommendations, and I think its title  
21 speaks for what it does.

22 Q. Fair enough. I would like an answer.

23                   Can you point me to any specific language in  
24   that chapter that makes reference to mass torts or

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1   discusses mass tort cases?

2                   I am asking you to go through and  
3   specifically do it. You do have a copy of the book  
4   in front of you; do you not?

5                   A. Yes, I do have a book.

6                   Q. Okay. Would you please flip through the  
7   chapter and point out the references to me.

8                   MR. MUNSON: Counsel, I object to the  
9   question. You have asked it a couple times and  
10   you can do this as easily as she can. What's  
11   there speaks for itself.

12                  MR. FINK: Counsel, I don't see it.

13                  If you want to stipulate to the fact that it  
14   is not there, then that is fine.

15                  I am asking the author of a book to point out  
16   specific references to me; I think I am entitled  
17   to a responsive answer.

18                  I am happy to sit here, I am happy to take a  
19   break, I want an answer to my question, unless you  
20   want to stipulate to the fact that they are not  
21   there.

22                  MR. MUNSON: I will stipulate to the fact  
23   that the words that are in this chapter are the  
24   words that are in this chapter, and what's there

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1   is there, and what's not is not.

2                   The witness has answered your question and  
3   testified to her view of what's there.

4                   It seems to me to be an utter waste of time  
5   to sit here and read something that anybody can  
6   read.

7                   MR. FINK: I would suggest it is a greater  
8   waste of time for us to sit here and debate it.

9                   Q. Professor, would you please point to me the  
10   chapter --

11                  Would you please point to me, to the language  
12   in the chapter on conclusions and recommendations that  
13   makes specific reference to mass torts or to any mass  
14   tort cases?

15                  MR. MUNSON: How long is the chapter?

16                  A. 244 to 250.

17                  Q. Six pages.

18                  MR. MUNSON: Well, why don't we take a short  
19   break and read the six pages and answer the  
20   question so that we can end the deposition.

21                  THE WITNESS: Okay.

22                  MR. FINK: Fair enough.

23                  THE VIDEOGRAPHER: We are now going off the  
24   record and the time is 2:14 p.m.

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1   (Recess.)

2                  THE VIDEOGRAPHER: Stand by, please.

3                  We are now going on the record, the time is  
4   2:24 p.m.

5                  Q. Professor, before we took that recess we were  
6   talking about the conclusions and recommendations  
7   chapter of your book. Have you had an opportunity to

8 review that?

9 A. Yes, I have.

10 Q. Okay. Can you now please point out to me the  
11 sections of that chapter that address mass torts or  
12 mass tort cases?

13 A. I am happy to. Apart from the general  
14 provisions and the conclusion about how to think about  
15 bankruptcy, how to think about cases, let me get to  
16 specifics of which there are eight.

17 On page 246 of the book I referenced the need  
18 to use shared professionals or panels of experts as a  
19 way of curving costs and saving time.

20 And earlier in the text I talked about why  
21 Chapter 11 cases can be very expensive, including in  
22 the context of issues involving future claimants.

23 So, that is the first example among several  
24 for that suggestion.

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1 The next bullet point relates to the  
2 recommendation that limited liability should be  
3 curtailed, and select limitations on discharge made  
4 applicable to corporate debtors to eliminate certain  
5 disparate treatment. And in that context in the book I  
6 talk generally about if corporate officers or directors  
7 did something bad knowingly, the law should perhaps  
8 consider being changed so that those individuals could  
9 be held responsible.

10 In the same way individual debtors are held  
11 responsible if they do something wrong.

12 And that is an issue that could come up in  
13 the context of mass tort cases should the officers or  
14 directors of a company that produced a product that was  
15 defective have some personal knowledge or information  
16 that led to them to behave badly.

17 The next recommendation is on page 247,  
18 that relates to the fact that although equality of  
19 treatment would remain the norm, certain creditors,  
20 self selecting creditors could rebut the presumption of  
21 pro rata distribution. And one of the groups that  
22 could do that would be tort claimants.

23 So, to the extent that my recommendations  
24 would involve a different way of treating creditors,

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1 certain creditors like certain of the mass tort  
2 creditors individually could come forward and ask to  
3 be treated better because of what's happened in their  
4 particular situation.

5 The next recommendations which deals,  
6 recommendation which deals with creditors committees  
7 and their selection and the need for a more diverse  
8 constituency speaks to an issue that I testified to,  
9 and that is also in this book about my concerns about  
10 how creditors committees are put together to ensure  
11 that those committees truly speak for the parties that  
12 they represent. And that is an issue that also arises  
13 in a mass tort case.

14 The next recommendation deals with tort  
15 claimants and other involuntary creditors, other than  
16 the government, being able to rebut in my suggestion  
17 the presumption of pro rata distribution upon a showing  
18 of substantive unconscionability, and that is yet

19 another example of what would happen in a mass tort  
20 case specifically referencing tort claimants.

21 On the next page 248, I have a recommendation  
22 regarding the definition of claims and specifically say  
23 that it should be expanded to include future claimants,  
24 because as I have indicated in the book, that is an

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1 area where there hasn't been definitive word yet and  
2 the code is not clear on that subject.

3 And lastly there are two bullet points  
4 related to recommendations involving the interests of  
5 community, where I suggest that bankruptcy has and  
6 Chapter 11, have ripple effects and can affect other  
7 communities, which is certainly possible in the mass  
8 tort context.

9 And it is my recommendation that the court  
10 take those ripple effects into account.

11 So, of the recommendations I have, these  
12 eight are ones that have particular applicability to,  
13 among other groups, mass tort Chapter 11 cases.

14 Q. Thank you, Professor.

15 MR. FINK: I have nothing further for you at  
16 this time.

17 MR. MUNSON: Thank you, Professor Gross.

18 THE WITNESS: My pleasure.

19 (Continued on next page)

20

21

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23

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1 THE VIDEOGRAPHER: We are now going off the  
2 record.

3 The time is 2:29 p.m.

4 This is the end of the tape labeled number  
5 6 and this concludes the video deposition of  
6 Professor Karen Gross.

7 (Time noted: 2:29 p.m.)

8

9 -----

10 KAREN GROSS, ESQ.

11

12

13 Subscribed and sworn to before me  
14 this day of 2000.

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1

2 C E R T I F I C A T E

3 STATE OF NEW YORK )

4 ) ss.  
5 COUNTY OF NEW YORK )  
6

7 I, ROBERT X. SHAW, CSR, a Notary  
8 Public within and for the State of New York,  
9 do hereby certify:

10 That PROF. KAREN GROSS, ESQ., the witness  
11 whose deposition is hereinbefore set forth,  
12 was duly sworn by me and that such  
13 deposition is a true record of the testimony  
14 given by such witness.

15 I further certify that I am not  
16 related to any of the parties to this action  
17 by blood or marriage; and that I am in no  
18 way interested in the outcome of this  
19 matter.

20 IN WITNESS WHEREOF, I have hereunto  
21 set my hand this 9th day of June, 2000.  
22  
23

---

24 ROBERT X. SHAW, CSR

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1  
2 ----- I N D E X -----  
3 WITNESS EXAMINATION BY PAGE  
4 K. GROSS MR. FINK 223, 313  
5 MR. MUNSON 228  
6

7 ----- INFORMATION REQUESTS -----

8 DIRECTIONS:

9 RULINGS:

10 TO BE FURNISHED:

11 REQUESTS:

12 MOVE TO STRIKE: 236, 245  
13

14 ----- EXHIBITS -----

15 GROSS FOR ID.  
16 Gross Exhibit 5, June 8, 2000 letter from Ezra  
17 Reinstein..... 223  
18

19 oOo  
20  
21  
22  
23  
24

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